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No.

73-75

In the

Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES STEEL CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, United States Steel Corporation, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on May 14, 1973, and denial of the petition for rehearing entered on June 8, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears as Exhibit 1 in the Appendix hereto and the order denying the petition for rehearing appears as Exhibit 2 in the Appendix. The District Court for the

Northern District of Indiana, Hammond Division, rendered two opinions in the case. Its opinion denying the Petitioner's motion to dismiss the information is reported at 328 F. Supp. 354 (N.D. Ind. 1970) and is appended as Exhibit 3 in the Appendix. Its order and memorandum denying Petitioner's Motion for Judgment of Acquittal or, In the Alternative, for a New Trial is unreported and appears as Exhibit 4 in the Appendix hereto.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered May 14, 1973. A timely petition for rehearing was denied June 8, 1973, and this petition for certiorari was filed within thirty days after that date excluding the final Sunday on which the petition would otherwise have been due. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the official regulations and pronouncements of the Secretary of the Army as to the scope and application of Section 13 of the Rivers and Harbors Act of 1899 (Title 33 U.S.C. §407) deprived Petitioner of fair warning as to what conduct the government intended to make criminal and thereby deprived Petitioner of Due Process of Law and precluded the government's proceeding with this criminal prosecution for violation of said Section 13?

2. Whether, following the decision of this Court in *United States* v. *Pennsylvania Industrial Chemical Corporation*, ... U.S. ....., 91 S. Ct. 1804, 41 L.W. 4614 (1973), Petitioner should be given the opportunity to establish as a defense to a criminal prosecution under

Section 13 of the Rivers and Harbors Act of 1899 (Title 33 U.S.C. §407) its justifiable reliance upon the official U.S. regulations and pronouncements with respect to Section 13 of that Act?

3. Whether the Court of Appeals erred in sustaining the District Court's exclusion of official government publications showing that the Corps of Engineers did not consider the Grand Calumet River to be a navigable water at the points in question, and that it did not exercise jurisdiction over that portion of the River and thereby deprived the Petitioner of the opportunity to establish that the prosecution violated Due Process of Law?

4. Whether Section 13 of the Rivers and Harbors Act of 1899 (33 U.S.C. §407), as accommodated with the Federal Water Pollution Control Act, applies to the discharges of process, cooling, or drainage water from an industrial drain as alleged and sought to be proved in this case?

5. Whether Petitioner was denied a fair trial by the conduct of the government in failing to produce documents, constituting the entire basis for the government's case on the navigability of the Grand Calumet River, an essential element of the crime alleged, as required by agreement and order of Court, until the afternoon preceding and morning of trial and the trial court's refusal to exclude them from evidence?

STATUTES INVOLVED

Section 13 of the Rivers and Harbors Act of 1899 (33 U.S.C. §407) provides:

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown,

discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby nagivation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152.

Section 16 of the Rivers and Harbors Act of 1899 (33 U.S.C. §411) provides:

"Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize,

or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person of persons giving information which shall lead to conviction."

Mar. 3, 1899, c. 425, § 16, 30 Stat. 1153.

The Federal Water Pollution Control Act as in effect during the relevant period of time prior to the adoption of the Federal Water Pollution Control Act Amendments of 1972, (Public Law 92-500, 86 Stat. 896,) particularly 33 U.S.C.A. §1151 (1971 Ed.), 33 U.S.C.A. §1160 (1971 Ed.), 33 U.S.C.A. §1174 (1971 Ed.) is set forth as Exhibit 5 in the Appendix hereto.

STATEMENT OF THE CASE

This is a criminal prosecution by the United States Government against the United States Steel Corporation based upon a two count information filed February 18, 1970, alleging violation of Title 33 U.S.C. §§407 and 411, also known as §§13 and 16 of the Rivers and Harbors Act of 1899, by the discharge of "refuse matter" into navigable waters of the United States. The date of the occurrences alleged was October 11, 1967. The nature of the occurrence alleged was, in Count I, the discharge of "reddish-brown particulate sediment" and, in Count II, "an oily substance" from drain pipes into the Grand Calumet River in Indiana, allegedly a navigable water of the United States. (App. below 10) Defendant filed a motion to dismiss the information for failure to charge a crime against the laws of the United States (App. below 11).

In its briefs and oral argument in support of this motion defendant relied extensively upon regulations and pronouncements of the United States Army Corps of Engineers and its officials to establish the non-application of the statute to the conduct alleged (App. below 15) (Pretrial transcript pp. 8-9). Defendant contended that this administrative interpretation, together with the history and purpose of the Act established that 33 U.S.C. §407, particularly when construed together with The Federal Water Pollution Control Act, did not apply to the discharges alleged. The District Court denied the motion to dismiss in an opinion reported at 328 F. Supp. 354 (N.D. Ind. 1970), set forth in the Appendix hereto as Exhibit 3.

The case was tried to a jury and the jury returned a verdict of guilty on both Counts. During the trial, evidence was presented by the government as to the alleged source and nature of the discharge (Tr. 92-141, 379-398). One witness testified that he took the samples on the date in question. (Tr. 98-108) One sample was taken from a drain 14″ in diameter flowing to within 2″ from the top part of the drain (Tr. 102-103). He described the discharge as a brownish dark substance which had traces of oil globules coming out on the top which smelled "kind of industrial" (Tr. 103). He took a sample from the top of the water flowing out (Tr. 104) in order to obtain the most material (Tr. 134). He then proceeded to a second pipe approximately 36″ in diameter where he observed another discharge flowing up to the top of the pipe and took a sample (Tr. 106).

Another witness testified that he observed and analyzed the samples for oil. The sample from the 36″ outfall he described as "clear water, white liquid with small amounts of reddish-brown particulate sediment on the bottom of the jar. There was no visible oil film on the surface of

the liquid, nor was there any odor "(Tr. 379-380). His analysis, which was accurate within 200 parts per million, showed 1,000 parts per million oil (Tr. 378, 380). His observations of the samples purportedly taken from the 14" pipe showed, "a clear, light brown colored liquid, with only slight sediment." (Tr. 384). There was no analysis on the particulate matter in these samples (Tr. 385) but again the same type of analysis for oil showed 1,000 parts per million. (Tr. 387)

During the course of the trial, including at the end of the government's case and the close of the case (Tr. 404, 521), Petitioner continually objected to the application of the statute. At the beginning of the Petitioner's case, Petitioner offered Defendant's Exhibit A which was a certified copy of the water quality standards approved by the Secretary of the Interior pursuant to the Federal Water Pollution Control Act and offered to prove its compliance therewith. (Tr. 418-421) The Court excluded this evidence, however, as irrelevant under its view of the statute. Petitioner also offered Defendant's Exhibits C and D for the purpose of establishing the continuing position of the Corps of Engineers that the portion of the Grand Calumet River in question was not a navigable water of the United States (Tr. 480-489) and therefore Petitioner was justified in believing that the statute was not applicable in this case. (Tr. 475) Again the Court excluded the evidence. (Tr. 490, 520)

The government's entire evidence on the issue of navigability at the trial rested on certain exhibits which were introduced over objection. Early in the proceedings defendant had filed a motion to produce documents pursuant to Rule 16 of the Federal Rules of Criminal Procedure. (App. 12) At the hearing on this motion, months before

trial, the government stated in open court that all documents requested, including all government exhibits, had been produced and any others could be excluded. (Pretrial Transcript pp. 65-66) Nevertheless, on the afternoon before and the morning of trial a mass of documents was produced without comment. Timely objection based on failure to produce was made to all these exhibits (Tr. 219-229) but all except one which had only cumulative effect were admitted (App. 38-39). These later proved to be the sole basis for the government's case on navigability.

Following the trial, defendant filed a Motion for Judgment of Acquittal, or, in the Alternative for a New Trial. (App. below 29) This motion also was denied. (See Exhibit 4 in the Appendix hereto).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH, MISCONSTRUES, AND MISAPPLIES THE DECISION OF THIS COURT IN UNITED STATES v. PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, ... U.S. ....., 93 S. Ct. 1804, 41 L.W. 4614 (1973).

This case gives rise to important questions of general application fully warranting the Court's granting of certiorari to review the decision below which conflicts with, misconstrues and misapplies the recent decision of the Court in *United States* v. *Pennsylvania Industrial Corporation*, ... U.S. ....., 93 S. Ct. 1804, 41 L.W. 4614 (1973) (hereinafter *PICCO*).

That decision, as the Court is aware, held that the official regulations construing and applying Section 13 of the Rivers and Harbors Act of 1899 (33 U.S.C. §407) were so misleading prior to 1970 as to entitle the defendant to raise them in bar of the prosecution on grounds of fundamental unfairness. Petitioner submits that in failing to adopt and apply the *PICCO* decision in this case, or even to consider it fully by granting a timely petition for rehearing, the Court below acted contrary to the decision in *PICCO*.

When the Court of Appeals for the Seventh Circuit rendered its original decision on May 14, 1973, it did not have the benefit of this Court's decision in *PICCO*. Likewise, Petitioner did not have the benefit of this decision in preparing or trying the case in the District Court or in presenting its appeal to the Court of Appeals. Immediately after the decision in *PICCO* and within the time allowed by the rules, Petitioner filed a Petition for a Rehearing, based in large part on this Court's opinion in *PICCO*. That Petition for Rehearing was denied.

In *PICCO* this Court stated, at 93 S. Ct. 1804, 1815.

> "Nevertheless, it is undisputed that prior to December 1970 the Army Corps of Engineers consistently construed Section 13 as limited to water deposits that affected navigation."

It further stated at 93 S. Ct. 1804, 1816-17:

> "Of course, there can be no question that PICCO had a right to look to the Corps of Engineers' regulations for guidance.
>
> • • •
>
> Thus, to the extent that the regulations deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."

The only material factual difference between *PICCO* and this case is that the discharges alleged here occurred in 1967, one year *prior* to even the 1968 revision of the regulations which, in the words of this Court at 93 S. Ct. 1804, 1816:

> "stated for the first time that the Corps would consider pollution and other conservation and environmental factors. . ."

In denying the Petition for Rehearing and refusing to consider the application of the *PICCO* decision to this case, the Court of Appeals said only that, although Defendant relied upon the regulations in question both in the District Court and Court of Appeals, it had not offered to factually establish its reliance thereon as a defense at trial.

Petitioner submits that this holding is contrary to and misconstrues and misapplies the decision of this Court in

PICCO and presents critically important issues of general application for review by this Court. First, it presents the issue of whether a defendant which has repeatedly relied on the regulations as a matter of law, both in its Motion to Dismiss and throughout the trial, to establish the fundamental unfairness of the prosecution contrary to Due Process, may be deprived of that defense after it has been recognized by the Supreme Court. Second, to the extent, if any, that *PICCO* is tied to the narrow factual manner in which the defense of Due Process is raised, the decision below would deprive this Petitioner and others, where the judgment has not become final, of the opportunity to assert its due process rights in the manner recognized for the first time by the Court of Appeals for the Third Circuit in 1972 and by this Court in 1973.

A. *PICCO Bars the Prosecution*

This Court should grant the writ to determine whether *PICCO* will be narrowly limited in a manner inconsistent with its holding and whether, as Petitioner believes, the Court intended *PICCO* to bar prosecutions for the normal discharge of process, cooling and run-off water prior to the establishment of the permit program in 1970, and particularly prior to the 1968 Amendments to the Regulations. Any other interpretation of *PICCO* would require, in the thousands of possible cases which might be brought by the government, that each defendant individually offer to prove its own reliance upon the Regulations. This would be a useless and wasteful gesture. At most, only five permits had been granted prior to the establishment in 1970 of the so-called Refuse Act Permit Program by Executive Order 11574. (Hearings before the Subcommittee on Energy, Natural Resources and the Environment of the Senate Committee on Commerce on the affects on Mercury in Man and the Environment, 91st Cong. 2d Sess. pp. 137,

168, 201 (July 1970)) Even these few permits were granted in circumstances completely distinguishable from those at issue in this case and in *PICCO*. (Appellant's Brief below, p. 44)

After the Permit Program was established, in excess of 23,000 applications were filed but only 23 permits were issued. (3 Environment Reporter, Current Developments 795). These 23,000 applications covered many more discharge sources since one application would be filed for a single industrial plant having many drains. These sources alone would and could, if the prosecutors so chose, give rise to many times 23,000 cases since the government has contended that each drain (see *PICCO*) and each day is a separate violation and the statute of limitation allows prosecutions for discharges back into 1966. To require individualized proof of reliance in each of these potential cases would impose an unnecessary burden on the courts and would rest on the supposition that either all industries in the United States were unaware of these regulations having the force of law, or that they were aware of them, had somehow divined that, despite their clear import they did not mean what they said and chose to be wilful scofflaws for a period of over 65 years. That such a supposition is both unreasonable and unwarranted is obvious from the fact that thousands of the applications were made when the new regulations were adopted setting forth a permit program for the first time.

As will be discussed, this Court has yet to pass on the proper application of Section 13, as construed *in pari materia* with the Federal Water Pollution Control Act, to the discharge of process and cooling water. Thus, the decisions of this Court, particularly *United States* v. *Standard Oil Co.*, 384 U. S. 224, 86 S. Ct. 1427, 16 L. Ed. 2d 492 (1966) were not themselves sufficient to give a warn-

ing that the statute would be applied to the discharge of process, cooling and runoff water, particularly from industrial outfalls. *United States* v. *Standard Oil Co., supra,* involved an accidental spill of 100 octane gasoline and not a discharge of process or cooling water and came to the Court on the limited issue of whether the commercially valuable nature of the material discharged took it out of the classification of refuse. Until *PICCO* it was the only Supreme Court case to consider the application of criminal penalties under Sections 13 and 16 and the legislative history and ambiguity of the language itself had caused considerable disagreement in the lower courts' interpretations of Section 13, as recognized by this Court in *PICCO.* (See *PICCO, supra,* fn. 23 at 93 S. Ct. 1804, 1814).

B. *PICCO Requires Reversal*

If, upon an examination of the merits of Petitioner's contentions, the Court believes factual proof of reliance is necessary, Petitioner would contend, in the alternative and at a minimum, the case should be remanded to the District Court to allow it to present the evidence that it, like PICCO, had relied on the administrative interpretation contained in the regulations and pronouncements of the Corps of Engineers. Where a defense based on the constitutional guarantee of Due Process *going to the substance of the case* first becomes apparent from the decisions of this Court after the trial on the merits, particularly where, as in the instant case, it is still pending on direct appeal, a defendant in a criminal case should be allowed to assert it. As stated in *Linkletter* v. *Walker,* 381 U. S. 618, 6-27 (1965), "Under our cases it appears (1) that a change in the Law would be given effect while a case is on direct appeal. . ." See *United States* v. *Schooner Peggy,* 1 Cranch 103 (1801), *Vandenbark* v. *Owens-Illinois Co.,* 311 U.S. 538 (1941). This situation

should be distinguished from cases such as *Johnson* v. *New Jersey,* 384 U.S. 719 (1966) where the Court held a purely prophylactic rule should apply only to conduct occurring after the Court's decision. Here the rule adopted by the Court was that, at a minimum, government conduct was such that the prosecution might be barred by Due Process and fundamental fairness. Such a rule goes to the merits of the case and should be applied to all cases in which the decision has not become final by exhaustion of direct appeals.

Therefore, Petitioner submits that in view of the importance of the issue to thousands of individuals and corporations who can be prosecuted, the Court should consider the contradiction between the opinion of the Court below and this Court's decision in *PICCO.* If the Court should find that Section 13 does apply to the discharge of industrial process, cooling and runoff water, *PICCO* should be clarified to establish that the regulations themselves were sufficiently misleading to bar prosecutions for discharges prior to 1970 without need of further redundant proof. In the alternative, the Court should grant this writ to consider remanding the case for purposes of allowing proof of actual reliance.

C. *PICCO Requires A New Trial And Admission Of Evidence That The Corps Of Engineers Considered The River Non-Navigable*

In this case and, Petitioner believes, in numerous other cases, another application of the *PICCO* doctrine of regulatory fairness is presented. Here the official publications of the Corps of Engineers, the agency charged with enforcing the statute, indicated that the river in question was not subject to its active jurisdiction and was not considered a navigable water of the United States, (Defendant's Exhibits C and D Tr. 480-490), and in that situation

evidence supporting the defendant's contention should, as in *PICCO*, be allowed to go to the jury. (The trial court excluded the issue of whether the discharges were made illegally to a non-navigable tributary because it was not charged (Tr. 410).) In this case, Petitioner offered two exhibits for the purpose of establishing the Corps of Engineers' position that the Grand Calumet was not navigable at the point in issue and that the Corps did not exercise jurisdiction. (Tr. 480-484) The Court excluded one exhibit entirely and struck the other after it had already been introduced. (Tr. 490, 520) The result was to deprive the Petitioner of the opportunity of presenting its defense to the jury. Petitioner urged this defense before the trial court and, relying upon the decision of the Third Circuit in *United States* v. *Pennsylvania Industrial Chemical Corp.*, 461 F. 2d 468 (3d Cir. 1972), urged it again before the Court of Appeals below.

While the issue of Petitioner's reliance upon the particular publications in question may appear to be a narrow issue of limited importance, it has far wider ramifications, both under this statute and others such as the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500, 86 Stat. 896). The issue of navigability is one not easily determined, and in most borderline cases private parties will rely upon the determination of the Corps of Engineers as to its jurisdiction over a particular waterway. Where they do so rely, their reliance must be considered justified. *PICCO, supra,* ..... U.S. ....., 93 S. Ct. 1804, 1816.

Petitioner submits that the decision below contradicted and misapplied the decision of this Court in *PICCO*, giving rise to issues of significant general importance warranting review by this Court.

2. THE DECISION OF THE COURT BELOW, IN THE FIRST INSTANCE, WAS BASED ON A RESOLUTION OF AN IMPORTANT ISSUE OF GENERAL APPLICATION LEFT UNDECIDED IN THIS COURT'S OPINION IN PICCO, THAT IS, THE PROPER CONSTRUCTION OF SECTION 13 OF THE RIVERS AND HARBORS ACT OF 1899 (33 U.S.C. §407) AND ITS ACCOMMODATION WITH THE FEDERAL WATER POLLUTION CONTROL ACT OF 1948.

The principal grounds for Petitioner's appeal below, until the decision of this Court in *PICCO,* was the non-application of Section 13 (33 U.S.C. §407) as accommodated with the Federal Water Pollution Control Act, to the discharges in question. This issue was not reached by this Court in *PICCO* because, as the Court pointed out at Fn. 10, 93 S. Ct. 1804, 1809, PICCO had not filed a cross petition for certiorari. In importance, however, it overshadows even those issues reached by the Court.

While this Court has passed on the right to civil relief for navigation impeding discharges (*United States* v. *Republic Steel Corporation,* 362 U.S. 482 (1960) and upon the availability of criminal penalties for a one time spill of commercially valuable material (*United States* v. *Standard Oil Company,* 384 U. S. 224 1966), it has never passed upon the application of Section 13, as accommodated with the Federal Water Pollution Control Act, to the normal discharge of process, cooling and drainage water.

It has been the position of the government in recent years, including in the *PICCO* case, that Section 13 (33 U.S.C. §407) is an absolute prohibition against the discharge of all process cooling or drainage water into navigable waters or tributaries, (except that flowing from public streets and sewers), unless a discharge permit is first obtained from the Secretary of the Army. This position was sustained by the Court below in the present case.

Petitioner submits on the other hand, that for the reasons mentioned below and to be more fully developed if the Court grants the writ prayed for, that the discharges of process, cooling and drainage water into the nation's waterways are regulated under the Federal Water Pollution Control Act, not Section 13 of the 1899 Act, and this construction carries out the intent of Congress and preserves the authority of the Secretary of the Army to maintain navigation under the latter Act.

The legislative history of Section 13, which was one section of a compilation of prior statutes adopted to protect navigation interests of the federal government, supported by its interpretation and administration by the Executive Branch of the Government for 70 years as well as a substantial body of judicial interpretation, shows that Section 13 was intended to be a navigation and not a pollution statute. See Comment, "Discharge of New Wine into Old Wineskins; the Metamorphosis of the Rivers and Harbors Act of 1899" 33 U. Pitt. L. Rev. 483 (1972).

Moreover, commencing with the adoption of the Federal Water Quality Act of 1965 and the subsequent Amendments of the Federal Water Pollution Control Act, Congress established a comprehensive program of federal water pollution control which was wholly consistent with the then current interpretation of Section 13, but which would be inconsistent and conflict with the interpretation of Section 13 now advanced by the government and adopted by the Court below. Congress made it clear that it assumed that water pollution control would be carried out under the Control Act as amended and that the Rivers and Harbors Act would be continued to be used for the protection of navigation. In its application to the present case, and in other similar ones presently pending, this intention of Congress is being frustrated by administrative

application and certain decisions of the lower courts which fail to consider the overall impact and relationship of the two statutes. The failure to have a definitive accommodation of the two statutes causes hardship for the regulated, confusion in the prosecution of numerous pending cases below, and seriously hampers the efforts to deal with the national problems of water quality control.

The failure to have a definitive interpretation of Section 13 and its relationship to the Federal Water Pollution Control Act as amended will continue to have pernicious effects, in that the government's interpretation of the 1899 law would emasculate the massive water control program now being implemented throughout the country, as mandated by Congress in the Federal Water Pollution Control Act Amendments of 1972.

This Court has repeatedly recognized the importance of accommodating and construing *in pari materia* statutes dealing with the same subject matter, e.g. *The Boys Markets, Inc.* v. *Retail Clerks Union Local 770*, 398 U. S. 235 (1970) and cases cited therein. Regardless of the construction and accommodation of the statutes reached by the Court, it is a question which fully warrants the Court's attention. Its general application is evidenced by the number of parties appearing as *amicus* in the *PICCO* case, including this Petitioner, and the United States Chamber of Commerce representing over five million business firms and individuals. The brief of the Chamber was directed almost solely to the proper interpretation of Section 13. The issue, however, was left open by the decision in *PICCO* and should now be decided.

CONCLUSION

For the reasons above, a writ of certiorari should be issued to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

.....

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APPENDIX

EXHIBIT 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972 JANUARY SESSION, 1973

No. 72-1590
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

UNITED STATES STEEL CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 70 HCR 12

GEORGE N. BEAMER,
Judge.

HEARD FEBRUARY 16, 1973 — DECIDED MAY 11, 1973

Before SWYGERT, *Chief Judge,* CUMMINGS and STEVENS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This criminal prosecution was based upon a 2-count information alleging violations of Sections 13 and 16 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 407 and 411). Count I alleged that defendant discharged refuse matter from a drainpipe into the east branch of the Grand Calumet River on October 11, 1967. Count II alleged that the defendant deposited refuse matter from another drainpipe into the same river on the same date. The refuse matter described in Count I consisted of a "red-brown particulate sedi-

ment" and in Count II, of an "oily substance." After a jury verdict of guilty, the district court assessed the maximum fine of $2,500 on each count, and defendant has appealed from the judgment imposing those fines. The district court's memorandum opinion is reported at 328 F.Supp. 354 (N.D. Ind. 1970).

In this Court defendant admits the discharges in question. In support of reversal it urges the non-applicability of the 1899 Act to the discharges because they did not affect the navigability of the receiving stream and because they occurred after enactment of The Water Quality Act of 1965, the contrariety of its conviction to Congressional intent and to due process in the absence of a regulatory permit program, and the erroneousness of certain of the trial court's evidentiary rulings. We affirm.

Applicability of Section 13 to Non-Navigation-Threatening Refuse Discharges

Defendant's principal agument is that Section 13 of the Rivers and Harbors Act of 1899 does not cover these discharges of effluent waste into the Grand Calumet River on the ground that the statute requires an effect on navigation. At the trial, the Government made no attempt to prove that these discharges impeded or obstructed navigation or had a tendency to do so. It contended, as it contends here, that the first clause of Section 13 applies to the present discharges regardless of an effect on navigation.

The statute in question has lately become known as the Refuse Act of 1899. Section 13 thereof provides:

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States,

or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful." (33 U.S.C. § 407)[1]

The first offense created by this statute, the offense for which defendant was prosecuted, consists in discharging into navigable waters "any refuse matter of any kind or description whatever." The sole exception to the refuse matter coverage is for municipal sewage.[2] The second por-

[1] For violations of Section 13, Section 16 of this statute imposes fines from $500 to $2500 or imprisonment for 30 days to a year or both. (33 U.S.C. § 411)

[2] See *United States* v. *Republic Steel Corp.,* 362 U.S. 482, 490.

tion of the statute addresses the depositing of "material of any kind in any place on the bank of any navigable water *** where the same shall be liable to be washed into such navigable water ***." Such depositing, however, is an offense only if thereby "navigation shall or may be impeded or obstructed." Although defendant contends Congress intended that this navigational effect limitation also apply to the refuse discharge prohibition of the first portion of the statute, we do not understand it to contend that the adverbial phrase embodying that limitation can properly be read to modify the definition of the first offense. Grammatically it cannot.

Section 13 contains two provisos, only the second of which is pertinent here. That proviso allows "the deposit of any material above mentioned in navigable waters" if upon prior application to him the Secretary of the Army

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[2] (Continued)

This exception had its genesis in an 1888 Act relating to discharges into New York Harbor (25 Stat. 209, as amended, 33 U.S.C. § 441). It is found in Section 6 of the Rivers and Harbors Act of 1894 (28 Stat. 363), which is drawn from the 1888 Act, and was carried through to Section 13 of the Rivers and Harbors Act of 1899. The district court observed it would be anomalous to have an exception for refuse matter "flowing from streets and sewers and passing therefrom in a liquid state" if the statute was aimed solely at materials which obstructed navigation because the excepted matter had no apparent tendency to obstruct navigation in the first place. 328 F. Supp. at 357. Of course, sewage "may contain some articles in suspension that settle out and potentially impair navigability," *United States* v. *Republic Steel Corp., supra* at 491, but permanent shoaling only occurs "in a few instances" and generally the suspended organic matter will decompose and pose no problem. *Id.* at n. 6. The exception addresses matter which typically will not affect navigability, but, on the other hand, does not exempt from a class of possibly obstructing material only that which could not impair navigation since it excepts all "liquid" sewage discharges.

grants a permit therefor. The criterion for granting the permit is the Chief of Engineers' judgment that "anchorage and navigation will not be injured" by the deposit. The final proviso makes sense only if it is interpreted to apply to both the first and the second offenses enunciated by the statute. There seems to be no question but that it applies to the second portion. Since the first clause is the one referring explicitly to a "deposit * * * into any navigable water," the proviso fits it most comfortably. If it did not apply to the first clause, no discharge of any refuse matter could ever avoid criminality.

On its face, therefore, the first part of Section 13 proscribes the discharge of "any refuse matter of any kind or description whatever" into navigable waters without a permit. The words of the statute do not impose any limitation of an effect on navigation or tendency to affect navigation on the refuse matter covered. Defendant's argument for reading in this qualification relies on legislative history as indicative of a Congressional concern only with discharges "which tend to impair navigability." We think the statute is plain on its face, but since words are necessarily inexact and ambiguity is a relative concept, we now turn to the legislative history, mindful that the plainer the language, the more convincing contrary legislative history must be.

Although statutes dealing with discharges in the navigable waters of New York Harbor were enacted in 1886[3] and 1888,[4] the first statute of general applicability was enacted in 1890. Section 6 of this statute made it unlawful to empty either from a vessel or from shore "any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river or navigable waters of the United States *which shall tend to impede or obstruct navigation* * * *" (emphasis supplied). It also prohibited the deposit

[3] 24 Stat. 329.

[4] 25 Stat. 209, as amended, 33 U.S.C. § 441.

of such materials on the bank of any navigable waters where it was liable to be washed into the waters and "whereby *navigation shall or may be impeded or obstructed.*" A proviso excepted deposits under a permit from the Secretary of War designating a place where the deposit would not obstruct navigation. 26 Stat. 453.

In 1894 Congress again legislated on the subject of discharges into navigable waters. Section 6 of the Rivers and Harbors Act of that year made it unlawful to discharge "by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state in the waters of any harbor or river of the United States * * * elsewhere than in the limits defined and permitted by the Secretary of War." 28 Stat. 363. The striking difference between the 1890 and 1894 Acts is the absence of any navigation-threatening qualification in the latter. Moreover, Section 6 of the 1894 Act has a shortened list of enumerated substances and introduced the exception for municipal sewage.

Defendant argues that the absence of any explicit qualification in the 1894 Act relating to navigational impairment does not mean that Congress intended to abandon that qualification. It seems true, as defendant suggests, that the 1894 Act was precipitated by the Corps of Engineers' complaint that the 1890 Act was difficult to enforce because it contained no provision for an *in rem* proceeding against a vessel or for liability of the master or engineer; the 1890 Act applied only to persons or corporations owning the vessel.[5] In response, Congress drew on Sections 2 and 4 of the 1888 New Work Harbor Act in enacting Sections 7 and 8 of the 1894 Act to supply the lacking features. However, it also borrowed from the New York Harbor Act to enact the substantive provision of the 1894 Act, Section 6, quoted in part above. It has been suggested

[5] H. Exec.Docs. No. 123, 53d Cong., 2d Sess. (1894).

that this was "redundant" because the Corps only sought additional liability provisions and the 1890 Act had already delineated the substantive offense.[6] Moreover, since the 1894 Act was appended to the annual river and harbor appropriation bill, it is suggested that there was a limited opportunity for debate and Congress was assured that the bill only prevented discharges which would affect navigation.[7] Although this is all very plausible, it is not a truly satisfactory basis for assuming Congressional oversight of the differences between the 1890 and 1894 statutes. Most probably Congress was primarily concerned with protecting the navigability of navigable waterways, but that is not to say it was exclusively so concerned. As the Supreme Court has said, "* * * the 'serious injury' to our watercourses * * * sought to be remedied was caused in part by obstacles that impeded navigation and in part by pollution * * *." *United States* v. *Standard Oil Co.*, 384 U.S. 224, 228-229. But even if Congress was solely preoccupied with protecting navigability, that would not negate Congressional resolve to forbid the discharges of the listed and other foreign substances regardless of their apparent effect on navigation unless specially permitted. To say that Congress was concerned with protecting navigation is not determinative of the scope of the measures Congress took to effect that protection.

In 1896 the Attorney General construed Section 6 of the 1894 Act "as an absolute prohibition" against the discharge of material which, although conceded to be covered by Section 6, would not have affected navigability. 21 Opinions of the Attorney General 305, 307. The "ore washings" involved, however, would have "destroy[ed] the fish, poilute[d] the water so as to destroy its usefulness for domestic purposes, and injure[d] the scenery along the stream." *Id.* at 306. Although the Attorney General opined

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[6] Comment, *Discharging New Wine Into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899*, 33 Univ. of Pitt. L. Rev. 483, 499 n. 59 (1972).

[7] *Id.* at 499-500.

that the Secretary of War was required to issue a permit under these circumstances, he indicated no doubt about the proposition that a permit had to be applied for and that the Secretary's judgment, rather than the discharger's about impairment of navigability was controlling.[8]

Also in 1896, Congress commissioned the Secretary of War to make a compilation of all laws enacted for the protection of navigable waterways and to submit to Congress therewith recommendations "as to revision, emendation, or enlargement of the said laws as, in his judgment, will be advantageous to the public * * *." 29 Stat. 324. The Secretary of War delegated the task to the Chief of Engineers, whose compilation and recommended draft were submitted to Congress.[9] The compilation listed Sections 6 of both 1890 and 1894 Acts, and the recommended draft was an attempt to consolidate these Acts into one Section, which became Section 13 of the Rivers and Harbors Act of 1899.[10]

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[8] The Attorney General's view that the Secretary's discretion extended only to considerations affecting navigability was premised on a restrictive interpretation of Congressional power under the Commerce Clause. However, that interpretation was not universally espoused even at the turn of the century (see *Scow No. 36,* 144 F. 932, 934 (1st Cir. 1906)) and, although likely, it was not necessarily that of the Fifty-third Congress. In any event, this restrictive interpretation is no longer viable; Congress does have the underlying power enabling the Secretary of the Army to decline to issue a permit on ecological grounds. See, *e.g., Zabel* v. *Tabb,* 430 F.2d 199, 203-204 (5th Cir. 1970); *Kalur* v. *Resor,* 335 F.Supp. 1, 11-13 (D. D.C. 1971).

[9] H. R. Doc. No. 293, 55th Cong., 2d Sess. (1897).

[10] *United States* v. *Standard Oil Co.,* 384 U.S. 224, 227. The person who did the actual work of compilation, later Judge Koonce, stated in lecturing on the evolution of the 1899 Act:

> "Under Section 10 as well as Section 13 relating to the discharge or deposit of refuse matter in navigable waters, the commission of any of the acts forbidden, not their results, constitutes the offense and the com-

Section 13 eliminated the enumeration of substances present in both the 1890 and 1894 Acts, substituting for them and their catch-alls the phrase "any refuse matter of any kind or description whatever." Moreover, as noted previously, the first portion of Section 13 was not modified by the navigation-threatening limitation appearing in the 1890 Act; only the second portion contains that modifier. The absence of the navigational effect limitation in the first portion of Section 13 is best explainable on the basis that Section 6 of the 1894 Act contained no such limitation. Even though the phrase "any refuse matter of any kind or description" must be construed *in pari materia* with the lists of substances found in the earlier Acts (see *United States* v. *Standard Oil Co., supra* at 228-228), it does not follow that only refuse matter which tends to impede navigation is covered. The enumeration in the 1890 Act ends with the catch-all "or other waste of any kind." If only materials with an inherent tendency to impede or obstruct navigation are involved, the modifier "whereby navigation shall or may be impeded or obstructed" is superfluous. The enumeration in the 1894 Act ends with the broader catch-all "or any other matter of any kind." The use of "any other matter of any kind" militates against an overly strict *ejusdem generis* construction, but in any event, it is obvious that not every discharge of the enumerated substances will tend to affect navigation. For instance, the discharge of "acid" is prohibited, but not every acid will be capable of corroding wharves or

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[10] (Continued)

mission subjects the offending party to the prescribed penalty *regardless of whether or not there is any actual injury to navigation.*" Lecture by Judge G. W. Koonce, O.C.E., before the Company Officers Class, The Engineer School, Fort Humphreys, Virginia, April 23, 1926, as reported in "Water Pollution Control Legislation—1971 (Oversight of Existing Program)," Hearings Before the H. Comm. on Pub. Works, 92nd Cong., 1st Sess. 284, 290 (emphasis added).

ships' hulls.[11] Yet a discharge of any acid without prior approval of the Secretary of War would certainly seem to be squarely in the teeth of the statutory prohibition.

Thus it is entirely consistent with defendant's hypothesis that Congress was only concerned with navigational impairment to construe the scheme of the 1899 Act as prohibiting the discharge of any refuse matter of any kind or description unless the Secretary of the Army determined the matter could have no adverse navigational impact. Indeed, assuming defendant's interpretation, this is a plausible construction because otherwise it would be up to the individual to determine whether his proposed discharge matter could have a tendency to obstruct navigation, and this is surely not a desirable feature if Congress was really intent on remedying the evil of navigational impairments. Much damage could be done by a discharger who considered his discharges harmless to navigation before they were discovered. Moreover, individual, private determination of the capability of refuse matter for affecting navigation is simply inconsistent with the comprehensive language used.

This review of the legislative history of Section 13 of the 1889 Act does not persuade us that the statute means other than what it says. The discharge of any refuse matter, regardless of any apparent effect on navigation, is prohibited in the absence of a permit even if Congress thought at the time of enactment that permits would not or could not be withheld on the ground that the material discharged was merely a pollutant.

Defendant also relies on the administrative interpretation of Section 13 as establishing that the officials charged with the administering of the Act did not believe that it applied to discharges which had no navigational effect. It asks us to "give great weight" to the administrative interpretation in determining the scope of the statute. In

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[11] See *Warner-Quinlan Co.* v. *United States*, 273 F. 503, 505 (3d Cir. 1921).

effect from 1965 through December 1968, the only regulation pertaining to Section 13 was 33 C.F.R. § 209.395 (1967).[12] But that regulation recites the statutory proscription of deposits in navigable waters of "refuse matter of any kind or description whatever" other than sewage. Although it states that the jurisdiction of the Department of the Army "is limited and directed to such *control* as may be necessary to protect the public right of navigation" (emphasis supplied), it does not purport to construe Section 13 as allowing, without permission, discharges of refuse matter which the discharger has determined to have no tendency to affect navigation. It does not suggest that the Secretary of the Army's determination of no navigational effect need not be interposed before any discharge of refuse matter is permissible. Furthermore, it states that the Department has directed "action" under Section 13 only *"principally"* against the discharge of those materials obstructive of or injurious to navigation. This regulation hardly amounts to an administrative interpretation that discharges such as defendant's are *ab initio* outside the reach of the statute's pro-

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[12] That regulation provided:

"Deposit of Refuse. Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407), prohibits the deposit in navigable waters generally of 'refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state'. The jurisdiction of the Department of the Army, derived from the Federal laws enacted for the protection and preservation of the navigable waters of the United States, is limited and directed to such control as may be necessary to protect the public right of navigation. Action under section 13 has therefore been directed by the Department principally against the discharge of those materials that are obstructive or injurious to navigation." 33 C.F.R. § 209.395 (1967)

hibition. The same is true of the 1968 amendment defendant relies on (33 C.F.R. § 209.200 (c) (2).)[13]

Moreover, in addition to the facial frailty of these regulations as support for defendant's position, earlier court decisions had interpreted the first offense created by Section 13 to have no navigational effect limitation. *La Merced*, 84 F. 2d 444 (9th Cir. 1936); *United States* v. *Ballard Oil Co.*, 195 F. 2d 369 (2d Cir. 1952; see also *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 490-491. Even if these regulations could be interpreted as defendant would like, administrative interpretation is entitled to little weight in the face of contrary judicial construction.

In sum, we conclude that what defendant characterizes as "pure dicta" in *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230, was not ill-considered. There the Supreme Court stated that as used in Section 13 of the Refuse Act of 1899, "[t]he word refuse includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse." We so hold in accord with our sister Circuits which have faced the same question. *United States* v. *Pennsylvania Industrial Chemical Corp.*, 461 F. 2d 468, 471 (3rd Cir. 1972), certiorari granted, 409 U.S.

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[13] That regulation provides:

"Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407) authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. Although the Department has exercised this authority from time to time, it is considered preferable to act under Section 4 of the River and Harbor Act of March 3, 1905 (33 Stat. 147; 33 U.S.C. 419). As a means of assisting the Chief of Engineers in determining the effect on anchorage of vessels, the views of the U.S. Coast Guard will be solicited by coordination with the Commander of the local Coast Guard District." 33 C.F.R. § 209.200(e)(2).

1074; *United States* v. *Ballard Oil Co.*, 195 F. 2d 369, 371 (2d Cir. 1951); *La Merced*, 84 F. 2d 444, 446 (9th Cir. 1936).[14]

Accommodation of Refuse Act of 1899 and Amended Federal Water Pollution Control Act of 1948

Defendant contends that the Refuse Act of 1899 and the Federal Water Pollution Control Act of 1948, as amended at the time of the discharges in question by The Water Quality Act of 1965,[15] (particularly 33 U.S.C. §§1151 and 1160), must be accommodated. First it argues that together they mean "that the Corps of Engineers should continue to have the power to deal with the dumping of waste matter having the potential to affect navigation under § 407 [Section 13 of the 1899 Act], while the prob-

[14] Defendant relied on dicta in *Guthrie* v. *Alabama By-Products Co.*, 328 F. Supp. 1140 (N.D. Ala. 1971), affirmed, ... F. 2d ... (5th Cir. 1972), which held that 33 U.S.C. § 407 did not create a federal cause of action in favor of private plaintiffs claiming pollution damage to their riparian lands. It did not focus on the issue here. *Bass Anglers Sportsman's Soc'y* v. *United States Steel Corp.*, 324 F. Supp. 412 (S.D. M.D. & N.D. Ala. 1971), affirmed, 447 F. 2d 1304 (5th Cir. 1971), also relied on by defendant, held that no "qui tam" action to recover fines imposable under 33 U.S.C. § 411 for violations of 33 U.S.C. § 407 could be maintained. This holding is not relevant to the present issue. See *Jacklovich* v. *Interlake, Inc.*, 458 F. 2d 923 (7th Cir. 1972). Finally, defendant adverts to *Kalur* v. *Resor*, 335 F. Supp. 1 (D. D.C. 1971), which held that the Secretary of the Army's permit regulations of April 7, 1971, 33 C.F.R. § 209.131, were beyond statutory authorization insofar as they covered non-navigable tributaries. Its holding is likewise not relevant here.

[15] The Federal Water Pollution Control Act of 1948 underwent further amendment in 1966 (80 Stat. 1246), but that amendment is immaterial here. Subsequent to the discharges in question, the Act was again amended in 1970 (84 Stat. 91), and was thoroughly revised in 1972. See 33 U.S.C. § 1251 *et seq.*

lem of water pollution generally is to be dealt with through resort to the Federal Water Pollution Control Act, as amended." Alternatively, defendant contends that those discharges of effluent industrial waste which do not violate the applicable Federal Water Quality Standards and Implementation Plan should be considered outside the purview of "refuse matter" in the 1899 Act.

We do not see the necessity for any accommodation. The two statutes are not irreconcilable if the coverage of the Refuse Act of 1899 extends to discharges of pollutant refuse matter, as we have determined it does. Cf. *Askew* v. *American Waterways Operators*, ... U.S. ...., 41 U.S.L.W. 4507. Had defendant secured a discharge permit, it could not have been in violation of the 1899 Act, and any pollution abatement recourse the Government would have had would only be under 33 U.S.C. § 1160. True, compliance with federal water quality standards developed under the amended Federal Water Pollution Control Act would not immunize defendant from prosecution for discharges without a permit under the 1899 Act. However, "[i]t is crucial to note that beginning with the Water Pollution Control Act of 1948, Congress has on four separate occasions in the past 24 years specifically stated that section 407 of the Rivers and Harbors Act, banning 'any refuse matter,' was not affected by the subsequent legislation." *United States* v. *Pennsylvania Industrial Chemical Corp., supra* at 472-473. See 33 U.S.C. § 1174. It may be hypothesized that Congress was unaware of the scope of the Refuse Act of 1899 when it consistently preserved its vitality, but in view of the Act's all-encompassing language and the existence of the early *La Merced* and *Ballard Oil Co.* decisions, as well as the *Standard Oil Co.* pronouncement prior to the latest preservation in 1970, this is a doubtful hypothesis. The Third Circuit has pointed out the Acts' consistency on the assumption that they "were designed to accomplish what may be viewed as the same end by different means." *United States* v. *Pennsylvania Industrial Chemical Corp., supra* at 473. But even if when enacting and amending the Federal Water Pollution Con-

trol Act of 1948 while preserving the Refuse Act of 1899 Congress saw the latter as a "navigational statute," that hardly means Congress thought pollutant discharges were outside of the Refuse Act's embrace. On the contrary, it would seem that explicitly preserving the 1899 Act's vitality in the context of anti-pollution legislation manifests recognition of the statutes' overlapping coverage. Notably in 1970 Congress directed the Secretary of the Army not to issue any permit unless applicable water quality standards were complied with. 33 U.S.C. § 1171 (b) (1). Of course, it is foolhardy to purport to be able always to divine the intentions and assumptions of Congress. But we perceive no conflict so irreducible or evidence of Congressional intent so strong as to nullify application of "the cardinal rule that repeals [of legislation] by implication are not favored." *Id.* quoting from *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549.

Consistency of Defendant's Convictions with Congressional Intent and with Due Process

Defendant argues that even if its discharges are within the proscription of Section 13 of the Refuse Act, its convictions are "contrary to the intention of Congress" because no regulatory permit program under Section 13 existed in 1967 at the time of the discharges. Relying on the Third Circuit's decision in *United States* v. *Pennsylvania Industrial Chemical Corp., supra*, it contends that in enacting Section 13 Congress intended to establish a regulatory program and in enacting The Water Quality Act of 1965 Congress must have contemplated the existence of such a program under Section 13 or, because of their incompatibility, it would not have preserved the latter statute.

However, Section 13 does not speak in terms of a regulatory permit program. Straightforwardly it provides that upon prior application the "Secretary of the Army • • • may permit the deposit of any material above mentioned in navigable waters • • •." Section 13 may be contrasted with Section 11 (33 U.S.C. § 404) which specifically con-

templates, though does not mandate, a regulatory program. See 33 U.S.C. § 406. And, even under the authority of Section 4 of the Rivers and Harbors Act of 1905, 33 U.S.C. § 419, "the establishing of a permit program by the Secretary of the Army and the Chief of the Corps of Engineers is discretionary with them as opposed to mandatory."[16] *Bass Anglers Sportsman's Soc'y* v. *United States Steel Corp.*, 324 F. Supp. 412, 416 (S.D., M.D. & N.D. Ala. 1971), affirmed, 447 F. 2d 1304 (5th Cir. 1971). If defendant's argument is correct, then it would follow that the discharge of anything—navigation threatening or not—is permissible so long as no permit program has been instituted. This stands the statute on its head. Clearly the statute generally proscribes refuse discharges unless in any instance the Secretary of the Army has exercised his discretion to permit it.

Furthermore, the efficacy of the Refuse Act of 1899 is not dependent upon its being contsrued to embody a formal regulatory program in order to make it compatible with subsequent anti-pollution legislation. After enactment of The Water Quality Act of 1965 allowing discharges which met minimum water quality standards, it could make no difference in terms of the general prohibition of the 1899 Act whether the Secretary of the Army determined the effect of a proposed discharge on navigation on an *ad hoc* basis or pursuant to a formal regulatory permit program. When in 1970 Congress instructed federal licensing or permitting agencies to disapprove proposed discharges which failed to meet applicable water quality standards (33 U.S.C. § 1171 (b) (1)), that did not undermine the across-the-board prohibition of refuse

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[16] 33 U.S.C. § 419 provides, in pertinent part:

"The Secretary of the Army is authorized and empowered to prescribe regulationss to govern the transportation and dumping into any navigable water, or waters adjacent thereto, of * * * refuse materials of every kind or description, whenever in his judgment such regulations are required in the interest of navigation."

matter discharges absent the Secretary's issuance of a permit therefor. And this limitation on the Secretary's permit power is not substantively affected by the manner in which the permit power had theretofore been exercised. Indeed implementation of the water quality restrictions was accomplished through the institution of the Refuse Act Permit Program by Executive Order 11574 in December of 1970,[17] but the fact that practical implementation of the 1970 water quality limitations necessitated a formal administrative permit program is not a sufficient reason to say that the previous absence of such a program rendered the general prohibition of the 1899 Act nugatory. Simply put, neither the 1965 nor the 1970 Act created a right to discharge refuse matter which did not theretofore exist.

Defendant would equate the absence of a regulatory permit program with the non-availability of a permit but cannot make that equation balance. Defendant does not contend that it ever applied for a permit and was refused, but rather argues that any application would have been unavailing. However, subsequent to the decision in *United States* v. *Republic Steel Corp.*, 362 U.S. 482, in May 1960, and prior to the time of defendant's discharges, at least four permits for the discharge of industrial waste were issued, three of which were issued by the Chicago District of the Corps of Engineers—the District having jurisdiction over the Grand Calumet River—to steel producers in the Chicago area allowing the discharge of treated process water into the Calumet River.[18] Although these permits were issued as part of the settlement of the *Republic Steel Corp., supra,* litigation, they militate against indulging in defendant's assumption that a permit applica-

[17] 35 Fed. Reg. 19627 (Dec. 25, 1970); 3 C.F.R. p. 309 (1973).

[18] "Effects of Mercury on Man and the Environment," Hearings Before the Subcomm. on Energy, Natural Resources, and the Environment of the S. Comm. on Commerce, 91st Cong., 2d Sess., pt. 2 at 168, 201 (1970).

tion would have been unavailing. This Court has previously recognized the Secretary of the Army's ability to grant a permit on an individual application in the absence of a formal permit program (*United States* v. *Republic Steel Corp.*, 286 F. 2d 875, 879 (7th Cir. 1961), and we think defendant was not entitled to assume a permit was unavailable. See *Poulos* v. *New Hampshire*, 345 U.S. 395, 410 n. 13.

Since defendant cannot successfully assert a defense that no permit was available, it is unnecessary to consider whether its conviction violated due process if it could not obtain a permit. However, we note that the First Circuit has, with cogency, rejected such a claim. *United States* v. *Granite State Packing*, 470 F. 2d 303, 304 (1st Cir. 1972).

Next defendant contends that its conviction violated due process because the Army Corps of Engineers had publicly stated that the Grand Calumet River was not a navigable water of the United States over which it exercised "active" jurisdiction. However, the two statements defendant points to, Exhibits C and D, both properly excluded from evidence (see *infra*), do not support defendant's reliance. The first statement bore the date of April 8, 1969, one and a half years after the discharges in question. The second statement refers to those bodies of water over which bridges cannot be built without advance approval of the Secretary of the Army. Neither statement purports to be a definitive list of navigable waterways within the District.

Evidentiary Rulings

The defendant assails various evidentiary rulings of the trial court. First under attack are the admissions of Government Exhibits 1 through 7 and 13. The basis of the challenge is their belated disclosure to defense counsel. On June 1, 1970, in its discovery motion, defendant sought to inspect and copy any documents in the Government's possession "which the government will introduce at the trial of this case or which contain information or evidence favorable to the defendant * * *." The Government

agreed to comply. Although the trial was first set for November 30, 1970, the cause was not actually called for jury trial until October 6, 1971. The Government's case was tried by Assistant United States Attorney Flynn of Hammond, Indiana, and James Moore of the Department of Justice in Washington, D.C. Mr. Moore came into possession of certain documentary material on the issue of the navigability of the Grand Calumet River in late September 1971. We are advised that the first time that Moore, Flynn and their navigability witness, Peter Machinis of Chicago, had an opportunity to discuss the documents together was on Tuesday morning, October 5, 1971, in Hammond. Defendant admits the receipt of copies of Exhibits 1, 2, 3, 5, 6 and 7 on that afternoon. As the district judge permissibly stated in admitting these exhibits and Exhibit 4, which was first shown to defense counsel on the morning of October 6th before trial commenced:

> "The [discovery] motion did not require any materials that the Government may have pertaining to this case, but asks for materials which the Government will introduce at the trial. Until the Government makes that determination to use it, or introduce, or attempt to introduce it at the trial, there was no duty to disclose."

Moreover, as the district judge also stated, defense counsel made no prompt motion for a continuance on the ground that there was inadequate opportunity properly to analyze or assess the material.

Exhibit 13, which was a compilation of Exhibits 1, 2 and 3 and was prepared by government witness Machinis and his assistant Mr. Kloker, was also received in evidence over defendant's objection. Exhibit 13 was first exhibited to defense counsel on October 6th before the opening of the trial. It was prepared on October 1st in six hours, the same day that Machinis received the underlying Exhibits 1, 2 and 3. Copies of Exhibit 13 did not come out of the reproduction room until October 2d, and the first time government trial counsel saw them was

on Tuesday October 5th, the day before the trial commenced. Although, as noted, the compilation was not made available to defendant's counsel until just before the start of the October 6th trial, the basic Exhibits 1, 2 and 3 had been given to defense counsel the day before.[19] Mr. Machinis did not take the stand until October 7th. Our study of the transcript shows that defendant's trial counsel was able to cross-examine him thoroughly as to the navigation exihibits.

Defendant did not begin its case in chief until October 11th and could have recalled Machinis as its witness or secured another surveyor to testify concerning the exhibits in question. Furthermore, exhibits of this nature were equally available to defense counsel. Since these documents were produced under the discovery motion as documents "which the government will introduce at the trial," defense counsel was on notice of their prospective use. Therefore, the district judge was justified in overruling as untimely a motion for continuance made after the empaneling of the jury.

We hold that the court's rulings with respect to the admission of these eight exhibits did not amount to an abuse of discretion. Defendant has not shown that the Government decided to use the exhibits substantially before they were exhibited to defendant. Similar documentary materials were available to defendant. There is no showing of prejudice, and any right to continuance came too late. In these circumstances, Rule 16 (g) of the Federal Rules of Civil Procedure did not require the district

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[19] The district court refused to receive Government Exhibits 16 and 17 into evidence because of their late disclosure on the morning the trial commenced. Exhibits 4 and 13 were admitted despite equally late disclosure, apparently because Exhibit 4 was just an additional map and because Exhibit 13 was just a compendium of Exhibits 1, 2 and 3. Furthermore, no separate objection appears to have been made that Exhibit 4 was not displayed to defendant until October 6th.

court to impose an exclusionary sanction upon the Government. See *Hansen* v. *United States*, 393 F. 2d 763, 770 (8th Cir. 1968).

Defendant asserts that the district court improperly excluded its Exhibits C and D. These exhibits were offered on the issue of navigability and as support for defendant's theory that the Government was, in effect, estopped under pain of due process from claiming the river was navigable. Exhibit C consisted of an April 8, 1969, Army Corps of Engineers public notice listing certain waterways within the Chicago District where the Corps of Engineers exercises "active jurisdiction" against obstructions to navigation and requires work permits under Section 10 of the Refuse Act (33 U.S.C. § 403). The portion of the Grand Calumet River adjacent to defendant's plant is not listed. Exhibit D is a May 9, 1958, public notice of the Army Corps of Engineers showing navigable waters in the Chicago District where the Secretary of the Army's approval is needed for plans for bridges. The span next to the defendant's plant on the Grand Calumet River is not included.

This case was tried on the theory that the Grand Calumet River was navigable in its state of nature and must therefore be deemed navigable thereafter as a matter of law. *Economy Light & Power Co.* v. *United States*, 256 U.S. 113; *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 408. Defendant does not challenge this legal proposition. The district court correctly excluded Exhibit C because whether the Corps of Engineers exercised control of works on a particular waterway would not be determinative of whether the waterway is navigable in the legal sense. Furthermore, the exhibit was issued in 1969 and did not relate to the navigability of the river at the time of these 1967 offenses and, as the district judge remarked, would "only tend to confuse the jury."

Exhibit D listed certain bodies of water under the heading "Navigable Waters of the United States Within the U.S. Army Engineers District, Chicago, Illinois, Re-

quiring Approval of Bridge Plans by the Secretary of the Army." The text of the document was to the effect that advance approval for the building of bridges over waterways in the Corps' Chicago District would no longer be necessary except as to specifically listed waters. The district court was correct in stating "this document has nothing whatsoever to do with navigability and does not so indicate."

The Government's historical evidence evidently satisfied the jury that this portion of the Grand Calumet River was once a navigable river. Once found to be navigable, the water remained so. *Economy Light & Power Co., supra.* Exhibits C and D were properly excluded as not material to the determination of navigability in law.

With respect to the other purpose for which the exhibits were offered—to establish the existence of an administrative policy to treat the Grand Calumet River as non-navigable and thereby estop the Government from claiming defendant should have applied for a permit—the exclusion was likewise correct. Exhibit C was properly excludible by virtue of its chronology alone; defendant hardly could have relied on the 1969 notice in 1967. Upon thorough examination of Exhibit D, the court below correctly found, "it certainly is not an indication of any policy by the Corps of Engineers to the effect that those [waters] over which the prior approval of bridges will not be required [are] considered by them as non-navigable." It was stipulated that between the date of Exhibit D in May 1958 and that of Exhibit C in April of 1969, there were no known public notices dealing generally with the subject of navigable waters.

We have considered the remaining arguments asserted by defendant and deem them to be without merit. Therefore, the judgment is affirmed.

AFFIRMED.

EXHIBIT 2

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 8, 1973

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. JOHN PAUL STEVENS, *Circuit Judge*

No. 72-1590

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

UNITED STATES STEEL CORPORATION,
Defendant-Appellant

On Appellant's Petition for Rehearing.

ORDER

In support of its petition for rehearing defendant argues, in part, that the Supreme Court's recent opinion in *United States* v. *Pennsylvania Industrial Chemical Corp.*, ... U.S. ....., 41 U.S.L.W. 4614 (May 14, 1973), requires that defendant have the opportunity to prove that it was affirmatively misled by regulations and other official pronouncements of the Corps of Engineers into believing that 33 U.S.C. § 407 did not apply to its discharges. However, in that case the defendant offered to prove at trial that it relied in good faith on 33 C.F.R. § 209.395 (1966) and 33 C.F.R. § 209.200(c)(2) (1969) in concluding its discharges were permissible under law, and it raised the exclusion of such proof as an issue on appeal. Here, in contrast, although defendant invokes the same regulations, it has pointed to no attempt in the trial below to prove that it actually relied upon them in making its

discharges,* and on appeal defendant utilized those regulations solely in an effort to establish an administrative interpretation to which, it argued, the Court should give great weight in construing 33 U.S.C. § 407. It did not argue that it had relied on these regulations in discharging the refuse matter, nor did it argue that any proof of reliance thereon was submitted and improperly excluded below. Insofar as Exhibits C and D are concerned, for the reasons set forth in the Court's opinion, their exclusion from evidence was justified. Had they been admitted, they could not have formed a sufficient basis to justify reasonable reliance, as the district court indicated in its ruling.

The petition for rehearing is denied.

EXHIBIT 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION
UNITED STATES OF AMERICA

vs.

UNITED STATES STEEL CORP.

Criminal No. 70 H Cr. 12
In The United States District Court

* * (Caption—Criminal No. 70 H Cr. 12) * *

O R D E R

Defendant has moved that the information be dismissed for failure to state an offense against the United States. The motion is Denied.

/s/ George N. Beamer
U. S. District Judge

Enter: November 10, 1970.

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* The latter regulation was promulgated after the discharges in question.

MEMORANDUM

Defendant has been charged by the United States Attorney with depositing refuse in navigable waters, in violation of 33 U.S.C. Sec 407. That statute, more commonly known as the Refuse Act of 1899, provides as follows.

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floatng craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any nevigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: And provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall

be unlawful. Mar. 3, 1899, c. 425, Sec. 13, 30 Stat. 1152."

The information filed against the defendant is drawn in two counts. Count I charges that:

> "On or about the 11th day of October, 1967, in the Northern District of Indiana, Hammond Division, United States Steel Corporation did unlawfully discharge and deposit and cause, suffer, and procure to be discharged and deposited refuse matter, that is, a quantity of a red-brown particulate sediment from a drain pipe on United States Steel Corporation property approximately 100 yards Northeast of Broadway Street, Gary, Indiana, on the North Bank of the Grand Calumet River into the East Branch of the Grand Calumet River, navigable waters of the United States, in violation of Title 33, United States Code, Sections 407, 411."

Count II is substantially the same, the only differences being the nature of the alleged pollutant ("an oily substance") and the location of the drain.

Defendant has moved for dismissal on a number of different grounds. First of all, it contends that the information is defective because it fails to allege that defendant acted "wilfully and knowingly". But no such requirement appears in the statute, and the Court can see no basis for implying one. Defendant points out, quite correctly, that the absence of an express reference to knowledge or intent in the statute is not conclusive if the offense is of a type traditionally requiring scienter. See Morrissette v. United States, 342 U.S. 246 (1952). However, the offense of depositing refuse in navigable waters is a malum prohibitum, not a malum in se,[1] and falls squarely within the category

[1] United States v. Interlake Steel Corp., 297 F. Supp. 912, 915 (N.D.Ill., 1969). Defendant maintains that the conduct proscribed by the Act would have constituted criminal trespass at common law, but that fact alone does not make a malum in se. A malum in se is an act traditionally regarded as inherently evil, and the offense charged here falls well outside that category.

of "public welfare offenses" described in Morrissette. As such, it could properly have been made the subject of strict criminal liability, and in the opinion of this Court, it was. The public is injured just as much by unintentional pollution as it is by deliberate pollution, and it would have been entirely reasonable for Congress to attack both.

The Refuse Act has been in existence for more than seventy years now; and as far as the Court can determine, no reported decision has ever imposed a scienter requirement. On the contrary, those courts presented with the question have uniformly held that no such requirement exists. E.g. United States v. Interlake Steel Corp., supra; The President Coolidge, 101 F. 2d 638 (9th Cir., 1939); United States v. Bigan, 170 F. Supp. 219 (W.D. Pa., 1959). The Court holds that scienter is not an essential element under the Refuse Act.

Defendant's next argument is that the only type of pollution covered by the Refuse Act is that which obstructs navigation—an effect not alleged here. Arguing primarily from legislative history and past enforcement practices, defendant contends that the Refuse Act is a "navigation statute", not a "pollution statute". But the fact remains that the part of the statute under which defendant is charged says nothing about effects on navigation,[2] and the vast majority of the courts faced with the question have ruled that no such limitation exists. See e.g., United States v. Esso Standard Oil Co., 375 F. 2d 621 (3rd Cir., 1967); United States v. Ballard Oil Co., 195 F. 2d 369 (2d Cir., 1952); La Merced, 84 F. 2d 444 (9th Cir., 1936).

Defendant stresses the anomaly of a pollution statute with an express exception for matter "flowing from streets and sewers and passing therefrom in a liquid state". But

[2] The Act itself applies only to navigable waters and their tributaries, but those are the only waters that Congress has power to regulate under the Commerce Clause.

if anything, that exception argues against defendant's interpretation. If, as defendant contends, the act was aimed solely at materials that obstructed navigation, why would Congress have made a special exception for liquid sewage—material with no apparent tendency to obstruct navigation in the first place.

Moreover, if the only deposits forbidden by the Act were those which obstruct navigation, the final proviso would make no sense. Under that proviso, the Secretary of the Army can permit otherwise illegal deposits if the Chief of Engineers finds that anchorage and navigation will not be impaired. If defendant's interpretation were correct, in any given case a permit would either be unnecessary—since non-obstructing deposits were never forbidden in the first place—or unobtainable—since the Secretary has no power to permit deposits that obstruct navigation. The final proviso makes sense only if the Act forbids deposits that pollute, as well as those which directly affect navigability.

In United States v. Standard Oil Co., 384 U.S. 224 (1966) the Supreme Court examined the Act's history in some detail. It concluded that "[i]t is plain from its legislative history that the "serious injury" to our watercourses . . . sought to be remedied was caused in part by obstacles that impeded navigation and in part by pollution [emph. added]". 384 U.S. at 228-29. This Court agrees. Obstruction of navigation is not an essential element under the first clause of the Refuse Act.

Defendant's next argument is that the information is insufficient because it fails to allege that defendant's discharges violated the water quality standards established for the Grand Calumet River under the Water Pollution Control Act, 33 U.S.C. Sec 1151 et seq. Defendant claims, and the government does not deny, that at all times relevant to this prosecution, defendant was in full compliance with all applicable federal and state water quality standards. The question thus presented is whether the Water Pollution Control Act creates an implied exception to the

Refuse Act. Can a polluter relieve itself of liability under the latter by complying with the former?

The answer appears in the Control Act itself. 33 U.S.C. See 1174 provides that "[t]his chapter shall not be construed as . . . affecting or impairing the provisions of sections 407, 408, 409 and 411 to 413 of this title. . .". A clearer statement of congressional intent could hardly be found.

Defendant argues that this section should be read in historical perspective—that at the time of its enactment in 1948, the criminal provisions of the Refuse Act had never been used against industrial polluters, and that as a result, the section should not be deemed controlling in a case like this. But the Control Act was revised extensively in 1965 and again in 1970; and even if, as defendant maintains, the Refuse Act was never applied to the type of pollution involved here until after 1965, it certainly was thereafter,[3] and the section quoted above still survived the 1970 amendments.[4] The Court is well aware of the dangers of arguing from legislative inaction, but when a significant statute in an area of substantial public and legislative concern survives extensive revisions to the regulatory scheme in which it appears, some weight can properly be attached to that fact.

Defendant relies heavily on The Boys Markets, Inc. v. *Retail Clerk's Union*, ... U.S. ...., 2 L. Ed. 2d 199 (1970), where the Supreme Court observed that at times it becomes the task of the judiciary to "accommodate" or "reconcile" older statutes to newer ones. The analogy at first blush is appealing, but one significant difference exists between this case and Boys Markets. There the newer statute made no reference at all to the older one. Here the newer one provides expressly that the older one shall remain unimpaired. Here Congress has already

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[3] See e.g., United States v. Interlake Steel Corp., supra.

[4] Section 1174 itself was amended by the 1970 Act. Part was deleted and the remainder renumbered, but the language relied on here remained the same.

spoken. The "accommodation" sought by the defendant would require the Court to repeal 33 U.S.C. Sec 1174, and no court has authority to do that.

Defendant protests that a literal reading of the Refuse Act will "hamstring" the administration of the Control Act by providing a self-incrimination defense to the latter's reporting requirements. Cf. Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 69 (1968); Haynes v. United States, 390 U.S. 85 (1968). That may or may not be true. Certainly a corporation has no privilege against self-incrimination. But in any event, that problem is for Congress to resolve, not this Court.

Defendant stresses the incongruity and unfairness of a regulatory scheme that provides for specific water quality standards, and yet permits the criminal prosecution of companies that spend millions of dollars in complying. The Court has considerable sympathy for defendant's position. The result is incongruous, and perhaps unjust. But the law is clear, and unless it violates the Constitution, this Court has no power to change it. It is the opinion of the Court that the Refuse Act forbids the discharge into navigable waters of all refuse other than that flowing from streets and sewers in a liquid state—regardless of intent, regardless of the effect on navigation, and regardless of whether or not federal water quality standards are violated.

Defendant contends that the Act, thus interpreted, is unconstitutional. First of all, it argues that the Act is unconstitutionally vague. Defendant likens the word "refuse", as used in the Refuse Act, to the term "waste" in the Oklahoma petroleum statute struck down by the Supreme Court in Champlin Rfg. Co. v. Commission, 286 U.S. 210 (1931). But significant differences exist. The term "waste' is wholly subjective. To determine without legislative guidelines whether or not a given act constitutes waste, a court would have to strike its own balance between the anticipated harm to the public and the eco-

nomic burden of the measures necessary to prevent it. No such inquiry is necessary to determine whether or not a given substance constitutes "refuse". In United States v. Standard Oil Co., supra, at 230, the Supreme Court held that "[t]he word "refuse" includes all foreign substances and pollutants apart from those "flowing from streets and sewers and passing therefrom in a liquid state" into the watercourse." While some, including this Court, might disagree with the breadth of that definition, no great exercise of judgment is required to decide whether a given substance fits it. The Act is not unconstitutionally vague.

Defendant next arues that the Act as interpreted above deprives it of riparian rights without just compensation, in violation of the Fifth Amendment. But defendant does not allege that it had any such rights in 1899, when the Act was passed; and if not, any rights defendant may have now were acquired subject to the restrictions of the Act. True, the Act was never enforced strictly until recent years, but as the Supreme Court said of a different law in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968), "[t]he fact that the statute lay partially dormant for years cannot be held to diminish its force today". On the present state of the record, there is no basis for a finding that the Act deprived defendant of riparian rights without just compensation.

Finally, defendant argues that the Refuse Act and the Control Act, taken together, form an unconstitutional scheme of regulation. Defendant contends that "its demands are so conflicting, its standards so vague, that it violates the due process requirements of the Fifth Amendment of the Constitution". But defendant is being prosecuted under the Refuse Act, not the Control Act, and the Court has difficulty in seeing how the enactment of the latter could retroactively render the former unconstitutional. If, as defendant contends, the combined effect of the two acts is to deprive it of due process, the challenge should be addressed to the Control Act, not the Refuse Act.

Moreover, the Court does not agree that the two acts together create an unconstitutional result. In the last analysis, they impose distinct and independent, but non-conflicting duties. Under the Control Act, the defendant is required to obey the abatement orders of the Indiana Stream Pollution Control Board. Under the Refuse Act, defendant is required to refrain from polluting in the first place. Defendant does not contend that either requirement exceeds the power of Congress under the Commerce Clause; and if not, the Court sees no reason why Congress could not constitutionally require both. Obviously the two acts were not designed as an integrated regulatory scheme, but their requirements do not, as defendant claims, conflict.

The remainder of defendant's arguments challenge the technical sufficiency of the information. First defendant argues that the information is defective because it fails to allege that the refuse was "other than that flowing from streets and sewers and passing therefrom in a liquid state". In an earlier era, that failure would undoubtedly have been fatal, since the exception appears in the clause that defines the offense, without being set off by punctuation or otherwise. See United States v. Britton, 107 U.S. 655 (1882); United States v. Cook, 84 U.S. 168 (1872). But times have changed, and courts no longer pay homage to the technicalities of commonlaw pleading. The modern rule is stated in Rule 7(c) of the Federal Rules of Criminal Procedure, which provides that "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

The information here is sufficient under that rule. The essence of the offense charged is depositing refuse in navigable waters. The Court does not believe that a purely negative fact—the inapplicability of the streets and sewers exception—should be treated as an "essential fact" under this statute. An information serves two main purposes: to apprise the defendant of the charges against him, and to describe those charges with sufficient particularity to

permit a defense of double jeopardy in the event of a subsequent prosecution for the same acts. See Russell v. United States, 369 U.S. 749, 763-64 (1962). The information here does both. No useful purpose can be served by disinterring the bone of Mr. Chitty at this late date.

Defendant next argues that the information should have stated whether or not defendant had a permit from the Secretary of the Army, and if so, whether the discharges in question were in violation of the conditions of the permit. However, the permit exception appears in the final proviso of the Act, and even under the cases cited by the defendant, an exception set off in a separate clause need not be negated in the information. Possession of a permit is a defense like any other, and the information is not defective for failure to anticipate it.

Defendant's final argument is that the information is defective because it fails to allege that the prosecution was undertaken at the request of the Secretary of the Army or some other official designated in 33 U.S.C. Sec 413. That precise argument was considered at length and rejected by Judge Robson in United States v. Interlake Steel Corp., supra. This Court concurs. 33 U.S.C. Sec 413 provides that "it shall be the duty of United States Attorneys to vigorously prosecute all offenders [against the Refuse Act and related provisions,] whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated." That provision is a command, not a limitation. Cf. United States v. Indiana Harbor Belt R. Co., 314 F. Supp. 697 (N.D., Ind., 1970. Ordinarily, decisions on whether or not to prosecute are within the sole discretion of the United States Attorney. 33 U.S.C. Sec. 413 restricts that discretion by making prosecution mandatory when requested by one of the specified officials. But it certainly does not forbid prosecution on the District Attorney's own initiative.

The Court concludes that the information does state an offense against the United States, and the motion to dismiss will therefore be denied.

EXHIBIT 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION
UNITED STATES OF AMERICA

vs.

UNITED STATES STEEL CORP.
Criminal No. 70 H Cr. 12

ORDER

Defendant has filed a motion for judgment of acquittal notwithstanding a jury verdict of guilty or in the alternative for a new trial.

The motion is DENIED.

/s/ George N. Beamer
U.S. District Judge

Enter: May 18, 1972

MEMORANDUM

Defendant's motion is based primarily on its assertion that the evidence was not sufficient for the jury to find that the Grand Calumet River was a navigable waterway of the United States. The court has carefully examined the briefs and reviewed the evidence and finds that the evidence on the question was sufficient for the jury to find that the Grand Calumet River was a navigable waterway within the purview of Title 33 §§ 407, 411 of U.S.C.

The Court has carefully considered defendant's allegations of errors in connection with the trial and has concluded that if there were any errors they were not substantial and cannot form the basis for a new trial.

The Court would have preferred to write a detailed memorandum anlyzing the contentions of the defendant, even though most of them are too insubstantial to warrant such treatment. However, the Court has spent innumerable hours in pre-trial matters in this misdemeanor

case—four days in trial and two full days in consideration of the post-conviction motions. With ninety-five felony cases and 350 civil cases awaiting the Court's attention, it cannot devote another day or two to the preparation of a detailed memorandum.

EXHIBIT 5

33 U.S.C.A. §1151

Congressional declaration of policy in controlling water pollution; rights of States to waters

(a) The purpose of this chapter is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution.

(b) In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution. The Secretary of the Interior (hereinafter in this chapter called "Secretary") shall administer this chapter through the Administration created by section 1152 of this title, and shall supervise and direct the head of such Administration in administering this chapter. The Secretary of Health, Education, and Welfare shall supervise and direct the administration of all functions of the Department of Health, Education, and Welfare which relate to water pollution.

(c) Nothing in this chapter shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C.A. §1160

Enforcement measures against pollution of interstate or navigable waters—Pollution of waters subject to abatement

(a) The pollution of interstate or navigable waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of any persons, shall be subject to abatement as provided in this chapter.

Encouragement of State and interstate action

(b) Consistent with the policy declaration of this chapter, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this section, be displaced by Federal enforcement action.

Water quality standards; procedure for establishment; considerations governing establishment; approval or modification by Hearing Board; violations

(c) (1) If the Governor of a State or a State water pollution control agency files, within one year after October 2, 1965, a letter of intent that such State, after public hearings, will before June 30, 1967, adopt (A) water quality criteria applicable to interstate waters or portions thereof within such State, and (B) a plan for the implementation and enforcement of the water quality criteria adopted, and if such criteria and plan are established in accordance with the letter of intent, and if the Secretary determines that such State criteria and plan are consistent with paragraph (3) of this subsection, such State criteria and plan shall thereafter be the water quality standard applicable to such interstate waters or portions thereof.

(2) If a State does not (A) file a letter of intent or (B) establish water quality standards in accordance with paragraph (1) of this subsection, or if the Secretary or the Governor of any State affected by water quality standards established pursuant to this subsection desires a revision in such standards, the Secretary may, after reasonable notice and a conference of representatives of appropriate Federal departments and agencies, interstate agencies, States, municipalities and industries involved, prepare regulations setting forth standards of water quality to be applicable to interstate waters or portions thereof. If, within six months from the date the Secretary publishes such regulations, the State has not adopted water quality standards found by the Secretary to be consistent with paragraph (3) of this subsection, or a petition for public hearing has not been filed under paragraph (4) of this subsection, the Secretary shall promulgate such standards.

(3) Standards of quality established pursuant to this subsection shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. In establishing such standards the Secretary, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses. In establishing such standards the Secretary, the hearing board, or the appropriate State authority shall take into consideration their use and value for navigation.

(4) If at any time prior to 30 days after standards have been promulgated under paragraph (2) of this subsection, the Governor of any State affected by such standards petitions the Secretary for a hearing, the Secretary shall call a public hearing, to be held in or near one or more of the places where the water quality standards will take effect, before a Hearing Board of five or more persons appointed by the Secretary. Each State which would be affected by such standards shall be given an oppor-

tunity to select one member of the Hearing Board. The Department of Commerce and other affected Federal departments and agencies shall each be given an opportunity to select a member of the Hearing Board and not less than a majority of the Hearing Board shall be persons other than officers or employees of the Department of the Interior. The members of the Board who are not officers or employees of the United States, while participating in the hearing conducted by such Hearing Board or otherwise engaged on the work of such Hearing Board, shall be entitled to receive compensation at a rate fixed by the Secretary, but not exceeding $100 per diem, including travel time, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 73b-2 of Title 5 for persons in the Government service employed intermittently. Notice of such hearing shall be published in the Federal Register and given to the State water pollution control agencies, interstate agencies and municipalities involved at least 30 days prior to the date of such hearing. On the basis of the evidence presented at such hearing, the Hearing Board shall make findings as to whether the standards published or promulgated by the Secretary should be approved or modified and transmit its findings to the Secretary. If the Hearing Board approves the standards as published or promulgated by the Secretary, the standards shall take effect on receipt by the Secretary of the Hearing Board's recommendations. If the Hearing Board recommends modifications in the standards as published or promulgated by the Secretary, the Secretary shall promulgate revised regulations setting forth standards of water quality in accordance with the Hearing Board's recommendations which will become effective immediately upon promulgation.

(5) The discharge of matter into such interstate waters or portions thereof, which reduces the quality of such waters below the water quality standards established under this subsection (whether the matter causing or contributing to such reduction is discharged directly into such

waters or reaches such waters after discharge into tributaries of such waters), is subject to abatement in accordance with the provisions of paragraph (1) or (2) of subsection (g) of this section, except that a least 180 days before any abatement action is initiated under either paragraph (1) or (2) of subsection (g) of this section as authorized by this subsection, the Secretary shall notify the violators and other interested parties of the violation of such standards. In any suit brought under the provisions of this subsection the court shall receive in evidence a transcript of the proceedings of the conference and hearing provided for in this subsection, together with the recommendations of the conference and Hearing Board and the recommendations and standards promulgated by the Secretary, and such additional evidence, including that relating to the alleged violation of the standards, as it deems necessary to a complete review of the standards and to a determination of all other issues relating to the alleged violation. The court, giving due consideration to the practicability and to the physical and economic feasibility of complying with such standards, shall have jurisdiction to enter such judgment and orders enforcing such judgment as the public interest and the equities of the case may require.

(6) Nothing in this subsection shall (A) prevent the application of this section to any case to which subsection (a) of this section would otherwise be applicable, or (B) extend Federal jurisdiction over water not otherwise authorized by this chapter.

(7) In connection with any hearings under this section no witness or any other person shall be required to divulge trade secrets or secret processes.

Notification of pollution; conference of State and interstate agencies; notice of conference date; summary of conference discussions

(d) (1) Whenever requested by the Governor of any State or a State water pollution control agency, or (with

the concurrence of the Governor and of the State water pollution control agency for the State in which the municipality is situated) the governing body of any municipality, the Secretary shall, if such request refers to pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originates, give formal notification thereof to the water pollution control agency and interstate agency, if any, of the State or States where such discharge or discharges originate and shall call promptly a conference of such agency or agencies and of the State water pollution control agency and interstate agency, if any, of the State or States, if any, which may be adversely affected by such pollution. Whenever requested by the Governor of any State, the Secretary shall, if such request refers to pollution of interstate or navigable waters which is endangering the health or welfare of persons only in the requesting State in which the discharge or discharges (causing or contributing to such pollution) originate, give formal notification thereof to the water pollution control agency and interstate agency, if any, of such State and shall promptly call a conference of such agency or agencies, unless, in the judgment of the Secretary, the effect of such pollution on the legitimate uses of the waters is not of sufficient significance to warrant exercise of Federal jurisdiction under this section. The Secretary shall also call such a conference whenever, on the basis of reports, surveys, or studies, he has reason to believe that any pollution referred to in subsection (a) of this section and endangering the health or welfare of persons in a State other than that in which the discharge or discharges originate is occurring; or he finds that substantial economic injury results from the inability to market shellfish or shellfish products in interstate commerce because of pollution referred to in subsection (a) of this section and action of Federal, State, or local authorities.

(2) Whenever the Secretary, upon receipt of reports, surveys, or studies from any duly constituted interna-

tional agency, has reason to believe that any pollution referred to in subsection (a) of this section which endangers the health or welfare of persons in a foreign country is occurring, and the Secretary of State requests him to abate such pollution, he shall give formal notification thereof to the State water pollution control agency of the State in which such discharge or discharges originate and to the interstate water pollution control agency, if any, and shall call promptly a conference of such agency or agencies, if he believes that such pollution is occurring in sufficient quantity to warrant such action. The Secretary, through the Secretary of State, shall invite the foreign country which may be adversely affected by the pollution to attend and participate in the conference, and the representative of such country shall, for the purpose of the conference and any further proceeding resulting from such conference, have all the rights of a State water pollution control agency. This paragraph shall apply only to a foreign country which the Secretary determines has given the United States essentially the same rights with respect to the prevention and control of water pollution occurring in that country as is given that country by this paragraph. Nothing in this paragraph shall be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States or the Water Utilization Treaty of 1944 between Mexico and the United States (59 Stat. 1219), relative to the control and abatement of water pollution in waters covered by those treaties.

(3) The agencies called to attend such conference may bring such persons as they desire to the conference. In addition, it shall be the responsibility of the chairman of the conference to give every person contributing to the alleged pollution or affected by it an opportunity to make a full statement of his views to the conference. Not less than three weeks' prior notice of the conference date shall be given to such agencies.

(4) Following this conference, the Secretary shall prepare and forward to all the water pollution control agen-

cies attending the conference a summary of conference discussions including (A) occurrence of pollution of interstate or navigable waters subject to abatement under this chapter; (B) adequacy of measures taken toward abatement of the pollution; and (C) nature of delays, if any, being encountered in abating the pollution.

Recommendation of Secretary to State agency to take remedial action

(e) If the Secretary believes, upon the conclusion of the conference or thereafter, that effective progress toward abatement of such pollution is not being made and that the health or welfare of any persons is being endangered, he shall recommend to the appropriate State water pollution control agency that it take necessary remedial action. The Secretary shall allow at least six months from the date he makes such recommendations for the taking of such recommended action.

Failure to take remedial action; public hearing; appointment of Board; notice of hearing; findings and recommendations; action of Secretary; requests for reports from persons whose alleged activities result in discharges causing or contributing to water pollution; failure to file report; forfeiture; prosecution

(f) (1) If, at the conclusion of the period so allowed, such remedial action has not been taken or action which in the judgment of the Secretary is reasonably calculated to secure abatement of such pollution has not been taken, the Secretary shall call a public hearing, to be held in or near one or more of the places where the discharge or discharges causing or contributing to such pollution originated, before a Hearing Board of five or more persons appointed by the Secretary. Each State in which any discharge causing or contributing to such pollution originates and each State claiming to be adversely affected by such polluton shall be given an opportunity to select one member of the Hearing Board and at least one member shall be a representative of the Department of Commerce,

and not less than a majority of the Hearing Board shall be persons other than officers or employees of the Department of the Interior. At least three weeks' prior notice of such hearing shall be given to the State water pollution control agencies and interstate agencies, if any, called to attend the aforesaid hearing and the alleged polluter or polluters. It shall be the responsibility of the Hearing Board to give every person contributing to the alleged pollution or affected by it an opportunity to make a full statement of his views to the Hearing Board. On the basis of the evidence presented at such hearing, the Hearing Board shall make findings as to whether pollution referred to in subsection (a) of this section is occurring and whether effective progress toward abatement thereof is being made. If the Hearing Board finds such pollution is occurring and effective progress toward abatement thereof is not being made it shall make recommendations to the Secretary concerning the measures, if any, which it finds to be reasonable and equitable to secure abatement of such pollution. The Secretary shall send such findings and recommendations to the person or persons discharging any matter causing or contributing to such pollution, together with a notice specifying a reasonable time (not less than six months) to secure abatement of such pollution, and shall also send such findings and recommendations and such notice to the State water pollution control agency and to the interstate agency, if any, of the State or States where such discharge or discharges originate.

(2) In connection with any hearing called under this section the Secretary is authorized to require any person whose alleged activities result in discharges causing or contributing to water pollution to file with him, in such form as he may prescribe, a report based on existing data, furnishing such information as may reasonably be required as to the character, kind, and quantity of such discharges and the use of facilities or other means to prevent or reduce such discharges by the person filing such a report. Such report shall be made under oath or otherwise, as the Secretary may prescribe, and shall be filed

with the Secretary within such reasonable period as the Secretary may prescribe, unless additional time be granted by the Secretary. No person shall be required in such report to divulge trade secrets or secret processes, and all information reported shall be considered confidential for the purposes of section 1905 of Title 18.

(3) If any person required to file any report under paragraph (2) of this subsection shall fail to do so within the time fixed by the Secretary for filing the same, and such failure shall continue for thirty days after notice of such default, such person shall forefeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where such person has his principal office or in any district in which he does business. The Secretary may upon application therefor remit or mitigate any forfeiture provided for under this paragraph and he shall have authority to determine the facts upon all such applications.

(4) It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of such forfeitures.

Action on behalf of United States to secure abatement of the pollution

(g) If action reasonably calculated to secure abatement of the pollution within the time specified in the notice following the public hearing is not taken, the Secretary—

(1) in the case of pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originate, may request the Attorney General to bring a suit on behalf of the United States to secure abatement of pollution, and

(2) in the case of pollution of waters which is endangering the health or welfare of persons only in the State in which the discharge or discharges (causing or contributing to such pollution) originate, may, with the written consent of the Governor of such State, request the Attorney General to bring a suit on behalf of the United States to secure abatement of the pollution.

Evidence; jurisdiction of court

(h) The court shall receive in evidence in any such suit a transcript of the proceedings before the Board and a copy of the Board's recommendations and shall receive such further evidence as the court in its discretion deems proper. The court, giving due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved, shall have jurisdiction to enter such judgment, and orders enforcing such judgment, as the public interest and the equities of the case may require.

Per diem allowances for members of Hearing Boards

(i) Members of any Hearing Board appointed pursuant to subsection (f) of this section who are not regular full-time officers or employees of the United States shall, while participating in the hearing conducted by such Board or otherwise engaged on the work of such Board, be entitled to receive compensation at a rate fixed by the Secretary, but not exceeding $100 per diem, including travel time, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law (section 73b-2 of Title 5) for persons in the Government service employed intermittently.

Definitions

(j) As used in this section the term—

(1) "person" includes an individual, corporation, partnership, association, State, municipality, and political subdivisions of a State, and

(2) "municipality' means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

Requests for reports from persons whose alleged activities result in discharges causing or contributing to water pollution; failure to file report; forfeiture; prosecution

(k) (1) At the request of a majority of the conferees in any conference called under this section the Secretary is authorized to request any person whose alleged activities result in discharges causing or contributing to water pollution, to file with him a report (in such form as may be prescribed in regulations promulgated by him) based on existing data, furnishing such information as may reasonably be requested as to the character, kind, and quantity of such discharges and the use of facilities or other means to prevent or reduce such discharges by the person filing such a report. No person shall be required in such report to divulge trade secrets or secret processes, and all information reported shall be considered confidential for the purposes of section 1905 of Title 18.

(2) If any person required to file any report under this subsection shall fail to do so within the time fixed by regulations for filing the same, and such failure shall continue for thirty days after notice of such default, such person may, by order of a majority of the conferees, be subject to a forfeiture of $100 for each and every day of the continuance of such failure which forfeiture shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States brought in the district where such person has his principal office or in any district in which he does business. The Secretary may upon application therefor remit or mitigate any forfeiture provided for under this subsection and he shall have authority to determine the facts upon all such applications.

(3) It shall be the duty of the various United States attorneys, under the direction of the Attorney General of

the United States, to prosecute for the recovery of such forfeitures.

33 U.S.C.A. § 1174.

Application to other laws

This chapter shall not be construed as (1) superseding or limiting the functions, under any other law, of the Surgeon General or of the Public Health Service, or of any other officer or agency of the United States, relating to water pollution, or (2) affecting or impairing the provisions of sections 407, 408, 409, and 411 to 413 of this title, or (3) affecting or impairing the provisions of any treaty of the United States.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-75

UNITED STATES STEEL CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is not yet reported. The memorandum of the district court denying the petitioner's motion to dismiss the information (Pet. App. 24a-33a) is reported at 328 F. Supp. 354, and its memorandum denying petitioner's motion for judgment of acquittal or, in the alternative, for a new trial (Pet. App. 34a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1973. A timely petition for rehearing was denied on June 8, 1973 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on July 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner, United States Steel Corporation, offered no evidence at trial of reliance on Corps of Engineers regulations as the reason for its otherwise unpermitted discharges into the Grand Calumet River, and did not assert any such reliance on appeal. Thereafter in *United States* v. *Pennsylvania Industrial Chemical Corp.*, No. 72-624, decided May 14, 1973, this Court held that evidence that a defendant had been "affirmatively misled" by those regulations would be a defense to the crime of which petitioner was convicted. The question presented is whether petitioner is entitled to have its conviction vacated so that it may introduce at retrial any evidence it might have of being "affirmatively misled."

STATUTES INVOLVED

Sections 13 and 16 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407 and 411, and portions of the Federal Water Pollution Control Act, are set forth in the petition (Pet. Br. 3; Pet. App. 35a-47a). Section 402(k) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. II) 1342(k), provides in pertinent part:

> * * * Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306 or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information

reasonably required or requested in order to process the application. * * *

STATEMENT

This is a criminal prosecution, instituted by way of information, charging petitioner, United States Steel Corporation, with two counts of violating the Rivers and Harbors Act of 1899 (Refuse Act), 33 U.S.C. 407, and 33 U.S.C. 411, by discharging a quantity of a red-brown particulate sediment and an oily substance into the east branch of the Grand Calumet River. Petitioner moved to dismiss the information for failure to charge an offense against the United States. The motion was a wide-ranging comprehensive attack on the Refuse Act; it did not, however, allege that petitioner had been affirmatively misled by administrative construction of the Act. The district court denied the motion.

A jury trial was held in October 1972.[1] During trial petitioner did not attempt to show that it had been affirmatively misled by the Corps of Engineers into believing that it did not need a Refuse Act permit to discharge liquified refuse. Petitioner did offer two Corps of Engineers documents to prove the non-navigability of the Grand Calumet River. One document, Exhibit C, issued in 1969, dealt with the acquisition of work

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[1] On May 30, 1972, the Third Circuit held in *United States v. Pennsylvania Industrial Chemical Corp.*, 461 F. 2d 468, that it was error for a lower court to refuse an offer of proof that a defendant had been affirmatively misled by the Corps of Engineers into believing that it did not need a Refuse Act permit to discharge liquified waste. Petitioner participated as *amicus* before the Third Circuit in *PICCO*, and consequently was fully aware of that court's holding before it went to trial in this case. (This aspect of the Third Circuit's holding was subsequently upheld in this Court's *PICCO* opinion. Slip op. at 15-20.)

permits under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, for construction on navigable waterways under the jurisdiction of the Corps. Exhibit C was excluded by the court since it was issued two years after the date of the discharge in question and would only tend to confuse the jury (Tr. 480-490). The second document, Exhibit D, was issued in 1958 and dealt with Corps' policy for the issuance of permits for bridge construction over navigable waterways. The court initially admitted Exhibit D (Tr. 490) and excerpts of it were read to the jury (Tr. 497). After hearing the testimony of the Chicago District Counsel for the Corps of Engineers, the court determined that Exhibit D was not relevant to the issue of the River's navigability and struck from the record both Exhibit D and the testimony of Chicago District Counsel (Tr. 510-517).

Petitioner was convicted on both counts and was fined $2,500 on each count. On May 11, 1973, the court of appeals unanimously affirmed, concluding (1) that the Refuse Act was not intended exclusively to protect the navigability of navigable waterways but also protects against pollution (Pet. App. 7a); (2) that a permit to discharge refuse could have been obtained, since prior to the discharge by petitioner three permits to steel producers to discharge treated process water into the Calumet River were granted by the Corps (Pet. App. 17a); and (3) that petitioner's Exhibits C and D were properly excluded by the district court, since they did not support the contention that the Corps of Engineers had declared the Grand Calumet River a non-navigable waterway (Pet. App. 18a).

On May 14, 1973, this Court rendered its decision in *United States* v. *Pennsylvania Industrial Chemical Corp.*, No. 72-624. Thereafter petitioner moved in the

court of appeals for a rehearing, alleging that in light of *PICCO* it should have the opportunity to prove that it was affirmatively misled by Corps of Engineers regulations into believing that the Refuse Act did not apply to its discharges. On June 8, 1973, the court of appeals denied the petition. The court noted that in *PICCO*, "* * * the defendant offered to prove at trial that it relied in good faith on 33 C.F.R. §209.395 (1966) and 33 C.F.R. §209.200(e)(2) (1969) * * * and it raised the exclusion of such proof as an issue on appeal. Here, in contrast, * * * [petitioner] has pointed to no attempt in the trial below to prove that it actually relied upon them in making its discharges * * *", nor did it argue that any proof of reliance thereon was submitted and improperly excluded below (Pet. App. 23a-24a).

ARGUMENT

1. The court of appeals denied United States Steel Corporation's petition for a rehearing after expressly considering this Court's *PICCO* decision. The court of appeals reasoned that, unlike the defendant in *PICCO*, petitioner had made no effort to demonstrate reliance on Corps regulations, either in the trial court or on appeal, as the justification for its otherwise unpermitted discharge. This contrasts with the situation in *PICCO*, where this Court stated (slip op. at 19):

> At trial, PICCO offered to prove that, in reliance on the consistent, long-standing administrative construction of §13, the deposits in question were made in good faith belief that they were permissible under law. * * *
>
> * * * * *

> * * * At this stage it is sufficient that we hold that it was error for the District Court to refuse to permit PICCO to present evidence in support of its claim that it had been affirmatively misled into believing that the discharges in question were not a violation of the statute.

Here, the only documents petitioner attempted to introduce, and upon which it allegedly relied, were two public statements issued by the Corps in 1958 and 1969. We discuss below the propriety of the district court's exclusion of these materials. Suffice it to say at this point that these statements were introduced for the specific purpose of proving that the Corps did not consider the Grand Calumet River a navigable waterway in 1967, and not to demonstrate that their issuance had affirmatively misled the petitioner into believing that liquified discharge in 1967 was generally permissible under law. Indeed, petitioner did not in any way claim at trial that it had been affirmatively misled in that regard even though, as previously noted (*supra*, p. 3, n. 1), petitioner was aware at that time of the relevance of such a defense.

2. The petitioner contends that the "normal discharge of process, cooling and drainage water" is not a pollutant, supposedly because it is "normal," and also because this Court in *United States* v. *Standard Oil Co.*, 384 U.S. 224, did not specify that "process, cooling and drainage water" is within the general classification of refuse covered by the Act (Pet. 13, 16).

The nature of the refuse involved in this controversy was characterized by the government in its information as "red-brown particulate sediment" and an "oily substance", and not "drainage water." In 1960 this Court affirmed the propriety of injunctive relief in a case

involving the discharge of almost identical liquified refuse resulting from the steel manufacturing process, and dumped into the Calumet River. *United States* v. *Republic Steel Corp.*, 361 U.S. 482. That decision suggests no exemption for refuse discharged in a liquid state other than municipal sewage (see 362 U.S. at 490-491); and the plain language of the statute, "any refuse matter of any kind or description whatever," clearly includes the discharge involved here.[2]

Petitioner further argues that this Court has not considered the relationship between the Federal Water Pollution Control Act and Section 13 of the Refuse Act, particularly as it affects the discharge of normal process, cooling and drainage water (Pet. 16-18). But, as we have seen, the refuse involved here is not exempt under the Act or this Court's previous rulings, and in *PICCO* this Court considered at length the relationship between the Federal Water Pollution Control Act and Section 13 of the Refuse Act, and expressly concluded that the two statutes are not in conflict (slip op. at 14) and that Section 13 prohibits discharges which cause pollution as well as those that affect navigation (slip op. at 15-17). Moreover, the petitioner's fears that 23,000 applicants for permits under the program established by Sections 401 *et seq.* of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. II) 1341 *et seq.*, are about to be prosecuted by the United States for violating Section 13 of the Refuse Act should

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[2] In *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230, this Court construed "refuse" as including "all foreign substances and pollutants." See also *PICCO*, *supra*, slip op. at 15-17, and *United States* v. *Interlake Steel Corp.*, 297 F. Supp. 912, 916 (N.D. Ill.), cited by this Court in *PICCO*, slip op. at 17, also involving the discharge of refuse similar to that involved here.

be allayed by Section 402(k), 33 U.S.C. (Supp. II) 1342(k), which provides in pertinent part:

> Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of * * * section 13 of the Act of March 3, 1899 * * *.

3. Petitioner further contends that the district court improperly excluded the two public statements (Exhibits C and D) made by the Corps of Engineers in 1958 and 1969, and thus "deprive[d] Petitioner of the opportunity of presenting its defense [that the Grand Calumet was not navigable] to the jury" (Pet. 15). The 1958 statement was issued for the sole purpose of identifying those navigable waterways where approval was required by the Secretary of the Army for bridge construction (Pet. App. 21a), and the 1969 statement was issued for the purpose of identifying waterways wherein the Corps exercised control over works that would require permits under Section 10 of the Refuse Act, 33 U.S.C. 403.

Navigability of a river turns upon whether it was a waterway in its state of nature, or whether it could be made so with reasonable improvements. *Economy Light and Power Co.* v. *United States*, 256 U.S. 113; *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 408. The exercise of control by the Corps of Engineers of works on a particular waterway would not, as the court of appeals found, "* * * be determinative of whether the waterway is navigable in the legal sense" (Pet. App. 21a). Both documents in question here are expressly directed to matters other than the navigability of the waterway (*e.g.*, approval for bridge construction

and works), and the 1969 statement could not, for any purpose, be determinative of navigability on the date of discharge in 1967.

In any event, the petitioner's contention that the Grand Calumet is not a navigable river suggests that the left hand—in discharging refuse into the Grand Calumet River in 1967—did not know what the right hand had done—in paying for the annual dredging of similar refuse in the same river since 1951 in order to preserve its navigability. *United States* v. *Republic Steel Corporation*, 155 F. Supp. 442, 450 (N.D. Ill.); *United States* v. *Republic Steel Corporation*, 286 F. 2d 875, 888 (C.A. 7).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

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SEPTEMBER 1973.

DOJ-1973-09

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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-75

UNITED STATES STEEL CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARGUMENT

a. INTRODUCTION

The initial Petition for Certiorari filed in this matter fully sets forth the questions presented and the reasons for granting the Writ. These issues are far broader, however, and of much greater general importance than can be determined from the Justice Department's Brief in Opposition. Moreover, because the Department's Brief, apparently filed sixty-three days after the Petition without benefit of an extension of time, unaccountably makes

several crucial misstatements of fact which will seriously mislead the Court if not corrected, Petitioner is compelled to submit this reply.

b. RESPONDENT'S FACTUAL ERRORS

First, despite the contrary allegation in Respondent's Brief, Petitioner did not have the benefit of the decision of the Court of Appeals for the Third Circuit in *PICCO, United States* v. *Pennsylvania Industrial Chemical Corp.*, 461 F. 2d 468 (3rd Cir. 1972), at the trial of this case in the District Court (Respondent's Brief p. 3, fn. 1). In fact, this case was tried in October of *1971,* almost eight months *prior* to the *PICCO* decision. At the trial, Petitioner therefore relied upon the official regulations to establish its defense to the criminal charges as a matter of law rather than of fact. Petitioner contends here that this reliance alone is sufficient to establish a defense. Should the Court disagree however, Petitioner should be given the opportunity to establish reliance as a matter of fact on retrial by the District Court.

Second, the name of Petitioner is United States Steel Corporation, not Republic Steel Corporation, and Petitioner was *not* a party to the litigation in *United States* v. *Republic Steel Corporation,* 155 F. Supp. 442 (N.D. Ill. 1957); *United States* v. *Republic Steel Corporation,* 286 F. 2d 875 (7th Cir. 1961) as implied by Respondent at page 9 of its Brief, and as a consequence made no payments to the Corps of Engineers pursuant to that litigation for the dredging of any river. Had the government bothered to consult a map it could easily have determined that the Grand Calumet River in Indiana *is not* the same River as the Calumet River in Illinois which was involved

in the *Republic Steel* litigation. The two rivers are many miles apart, in different states and are completely desparate in character. Neither Petitioner nor the United States Army Corps of Engineers has *ever* dredged the portion of the Grand Calumet River here in question for the purpose of preserving its navigability. Petitioner consistently maintained below that this portion of the Grand Calumet River was in fact non-navigable. Finally, there is no evidence in the record upon which to conclude as the government does (Respondent's brief pp. 7 and 9), that the discharges involved here was "similar" to those involved in the *Republic* litigation, as no quantitative or qualitative tests whatsoever were performed on the solids allegedly discharged by Petitioner here.

Third, contrary to the import of page six of the Respondent's Brief, Petitioner twice made specific request at trial for the admission of its Exhibits C and D, (public statements of the Corps of Engineers that the Grand Calumet River was not navigable, and the Corp's decision not to exercise jurisdiction over this portion of river) for the express purpose of demonstrating that such notices affirmatively misled Petitioner as to the application of the statute. (Tr. 475, 521). This offer coupled with the government's stipulation that there existed no contrary notices, (Tr. 483-84) amply established a Due Process defense and preserved the question for appeal.

Fourth, Respondent has suggested that Section 402(k) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. II) §1342(k) deprives the case of general importance for the reason that an application for permit pursuant to Section 402 would be a defense to a prosecution for violation of 33 U.S.C. §407. It should

be here emphasized that such a position is completely contrary to Justice Department assertions in other cases where it has contended that the Federal Water Pollution Control Amedments of 1972 have no effect on actions pending prior to the effective date of that legislation in October of 1972. (See e.g. *United States, et al* v. *United States Steel Corporation*, 72 C 2503 pending in the Northern District of Illinois, Eastern Division.)[1] It has even

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[1] In that case, the United States made the following contentions in its "Memorandum of the United States of of America in Opposition to Defendant's Motion to Dismiss:

> "The 1972 amendments to the Federal Water Pollution Control Act, while providing that applicants for Refuse Act permits shall not be in violation of the Refuse Act until December 31, 1974 or, if sooner, until final administrative action has been taken on permit applications submitted under the new statute (Section 402(k)), also provide that no suit, action, or other proceeding lawfully commenced by an officer of the United States shall abate by reason of the taking effect of the Amendments (Section 4(a))."
>
> • • •

The Savings (Section 4(a)) operates to continue previously existing laws in effect for the purpose of determining the proceedings begun under those laws.

• • •

The Refuse Act is not repealed by the 1972 Amendments to the Federal Water Pollution Control Act. Section 511 of the Amendments specifically provides:

> "This Act shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this Act. . . ."

Application of the Refuse Act to the facts of this case is not suspended for the reason that defendant submitted a permit application for its Waukegan Works prior to the institution of this action. 33 CFR Section 209.131(d) (4) of Part 202, Chapter 2, in effect on the date this action was instituted states:

been asserted that discharges occurring prior to the establishment of the Refuse Act Permit Program, or thereafter even in circumstances where a permit was applied for but not acted upon, were nevertheless illegal and subject to prosecution.[2] Thus, under the Justice Department's previously stated theory, the over 17,000 permit applicants *would* be subject to prosecution for all discharges within the statute of limitations which occurred prior to October of 1972. Demonstrative of this position, the Justice Department has shown its willingness to pursue such cases and force a case by case determination of individual factual reliance on the regulations which this Court found in *PICCO* to be sufficient to constitute a defense. Both judi-

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[1] (continued)

". . . the mere filing of an application requesting permission to discharge or deposit into navigable waters or tributaries thereof will not preclude legal action in appropriate cases for Refuse Act violations."

These arguments were apparently adopted by the District Court in denying Defendant's Motion to Dismiss and the case is still pending, as are other cases involving this Petitioner and others.

Furthermore, United States Environmental Protection Agency Regulations now state at 40 CFR, Section 125.42:

"(b) Except as provided in section 402(k) of the Act, the mere filing of an application for a permit to discharge into waters covered by the NPDES will not preclude legal action in appropriate cases for violation of the Act and section 13 of the Act of March 3, 1899 (the Refuse Act). The institution of either a civil or criminal action by the United States may not preclude the acceptance or continued processing of a permit application."

(38 FR 13527, May 22, 1973; as amended by 38 FR 17999, July 5, 1973, and 38 FR 198944, July 24, 1973).

[2] 3 Environment Reporter, *Current Developments*, 1229-1230 (Feb. 9, 1973).

cial economy and the rights of those subject to the statute will thus be served should the Court determine by a decision here whether reliance on the regulations as a matter of law can establish a similar defense.

Lastly, the government's brief completely ignores the undisputed fact that this Court expressly refused to pass upon the question of the proper accommodation and interpretation of the Rivers and Harbors Act in light of the various existing federal water pollution control statutes. See Footnote 10 to the *PICCO* opinion. Thus this Court has clearly left open the proper interpretation of the Rivers and Harbors Act to await the presentation of a case involving the proper factual circumstances. Petitioner respectfully urges that this case offers the Court its awaited vehicle in which to complete the interpretation task left unfinished in *PICCO*.

CONCLUSION

For the reasons set forth in the Petition and above and because the Government has stated no valid reason for denying the Petition, Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1973

No. 73-75

UNITED STATES STEEL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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1. The petitioner (Pet. Reply Br., p. 2) has correctly pointed out a factual error—which we regret—in the government's Brief in Opposition. The date of trial in this case was October 1971, some eight months prior to the decision of the Court of Appeals for the Third Circuit in *United States* v. *Pennsylvania Industrial Chemical Corp.*, 461 F.2d 468, rather than October 1972 as we erroneously stated. Nevertheless, *prior* to the trial in this case petitioner (a) had been charged, on the same day and in the same court as PICCO, with violations of the Refuse Act (Crim. No.

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71–74, W.D. Pa., filed April 6, 1971),[1] and (b) had been sufficiently aware of the defenses raised by PICCO at trial and adjudicated in the district court decision in *PICCO,* 329 F. Supp. 1118, July 26, 1971, to request *amicus* participation in the court of appeals in that case (granted September 9, 1971). Moreover, the decision rendered by the court of appeals in *PICCO* on May 30, 1972, supporting the defense of estoppel advanced by PICCO, was available to the petitioner prior to its appeal to the Seventh Circuit in this case; yet petitioner did not raise the issue in the court of appeals at that time.

2. We did not, as petitioner suggests, confuse United States Steel Corporation with Republic Steel Corporation. In *United States* v. *Republic Steel Corporation,* 155 F. Supp. 442, 450 (N.D. Ill.), the district court found as a matter of fact that:

> Two other iron mills are located along the banks of the entrance channel of the Calumet River. * * * These are the *United States Steel Company* and Youngstown Sheet and Tube Company. Since 1951 these two companies have paid for the dredging annually of all shoals in the entrance channel in order to maintain the authorized channel depth of 26 feet at that point. [Emphasis added.]

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[1] On September 4, 1973, PICCO pleaded *nolo contendere* to two counts of the four-count information. PICCO was fined $1,250 on each of the two counts. On September 27, 1973, United States Steel Corporation pleaded *nolo contendere* to 17 counts of the 35-count information in Crim. No. 71–74 (W.D. Pa.), *supra,* and was fined $500 on each of the 17 counts.

See also *United States* v. *Republic Steel Corporation*, 286 F. 2d 875, 888 (C.A. 7). More importantly, petitioner's own witness testified to the occurrence of dredging of petitioner's refuse as early as 1942 immediately adjacent to the steel plant in this case (Tr. 458–461).

The evidence at trial showed that the Grand Calumet River—found to be a navigable waterway—and the Calumet River were historically the same river, flowing through both Indiana and Illinois, and emptying into Lake Michigan (Tr. 146, 164, 205, 206, 432–435).

CONCLUSION

For the reasons set forth in the petition and above, the petition should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973